

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P.No.964 of 2019

Nusrat Bibi etc.

Vs.

Zeeshan Ahmad etc.

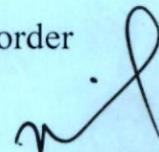
<i>Sr. No. of order/ proceedings</i>	<i>Date of order/ Proceeding</i>	<i>Order with signature of Judge, and that of Parties' counsel, where necessary</i>
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10.01.2019

Mr. Muhammad Amin Ashraf Khan, Advocate for petitioner.
Ms. Zarish Fatima, Assistant Attorney General. On Court's call.
Mr. Muhammad Arshad Manzoor, AAG. On Court's call.
M/s. Nasrullah Khan Babar, Ch. Muhammad Naseer and Ms. Uzma Razzaq Khan, Advocates/Amicus curiae.

Through this constitutional petition, the petitioner has called in question the orders dated 28.11.2017 and 13.10.2018 passed by learned Judge Family Court, Kasur whereby the said court dismissed the application filed by the petitioner for fixing interim maintenance allowance of minor Rizwan.

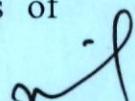
2. Brief facts of the case are that petitioner No.1, Nusrat Bibi("petitioner") filed a suit for recovery of maintenance allowance for herself and her son Rizwan minor/petitioner No.2 ("minor") alongwith delivery expenses and dowry articles. The said suit was contested by respondent No.1("respondent") who denied the paternity of the minor. Vide order



dated 28.11.2017, the Judge Family Court, Kasur did not fix the interim maintenance allowance of the minor and adjourned the matter for pre-trial reconciliation. Subsequently, the petitioner filed an application on 01.10.2018 requesting the court to fix interim maintenance allowance of the minor which was contested by the respondent and the trial court dismissed the same vide order dated 13.10.2018. Both the said orders are under challenge through instant constitutional petition.

3. Learned counsel for the petitioner has argued that the minor is legitimate son of petitioner, therefore, the respondent is obliged to make payment of interim maintenance allowance to the minor and the orders passed by the trial court dismissing the said application are non-speaking and liable to be set aside.

4. Conversely, learned Law Officers as well as amicus curiae appointed by this Court have argued that although appeal is not maintainable against an interim/interlocutory order, if the said order finally determines an issue or dispute, the same cannot be treated as merely an interlocutory order as the same would amount to a “decision given” in terms of



Section 14 of the Family Courts Act, 1964 ("Act")

against which an appeal would be maintainable.

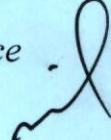
5. Heard. Record perused.

6. Learned counsel for the petitioner when confronted with the question of maintainability of this constitutional petition, has argued that the aforesaid orders are interlocutory in nature and appeal against the same is barred under Sub-Section 3 of Section 14 of the Act, therefore, the petitioner has approached this Court in its constitutional jurisdiction to protect the rights of the minor.

7. The question that arises for determination is whether the impugned orders are of the nature of interlocutory orders or amount to "a decision given" in terms of Section 14 of the Act making the same amenable to the jurisdiction of appellate court by way of filing an appeal. To resolve the controversy, it would be appropriate to reproduce relevant portions of the orders dated 28.11.2017 and 13.10.2018:

"28.11.2017:

Written statement alongwith fard pata, Schedule of witnesses and list under Order 7 Rule 14 CPC has been filed on behalf of the defendant. Perusal of written statement shows that the defendant challenged the dependent of the minors therefore the interim maintenance



allowance of the minors has not been fixed at the present stage and case is adjourned for pretrial reconciliation proceedings for 13.12.2017.”

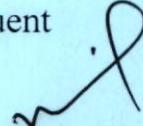
“13.10.2018:

.....

6. *The plaintiff No.1 has also filed another application for fixation of interim maintenance of minor plaintiff No.2. Confronting with the record it reveals that Mst. Maria Shehzadi, learned predecessor of this Court, vide order dated 28.11.2017 has not fixed the interim maintenance of minor which order is still intact. The aggrieved party may assail this order under the law, if recommended. This application is dismissed.*

.....”

8. Vide order dated 13.10.2018, the application filed by the petitioner for fixing interim maintenance allowance of the minor has been dismissed by making reference to the earlier order dated 28.11.2017. Perusal of order dated 28.11.2017 shows that through said order the court had not decided anything and without fixing the interim maintenance allowance of the minor at the said stage had adjourned the matter for pretrial reconciliation proceedings, the effect of which was that the said matter had been kept pending for decision in subsequent proceedings. The earlier order dated 28.11.2017 merged into the subsequent



order dated 13.10.2018, whereby the application of the petitioner seeking fixation of interim maintenance allowance during pendency of the suit has been finally decided by dismissing the same and nothing remains pending relating the said issue. The right of a wife and minor to seek interim maintenance allowance from husband/father is provided under Section 17-A of the Act and the Family Court by mandate of the said section is obliged to pass an order fixing the same, if the parties are otherwise found entitled to the same in the given circumstances of the case. The non-compliance of such an order has penal consequences, therefore, the court is required to apply judicious mind in passing such an order and in appropriate cases can refuse to fix interim maintenance allowance is the situation so requires. The said section is reproduced below:

“17A. 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 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."

The trial court has, while dismissing the application for interim maintenance allowance, declined the claim of the minor for entitlement to receive interim maintenance allowance during the pendency of suit permissible under Section 17-A of the Act. To determine whether the said order is appealable, Section 14 of the Act which relates to appeals is reproduced below:-

14. Appeals.- (1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable-



(a) to the High Court, where the Family Court is presided over by a District Judge, an Additional District Judge or a person notified by Government to be of the rank and status of a District Judge or an Additional District Judge; and
 (b) to the District Court, in any other case.
 (2).....

(3) No appeal or revision shall lie against an interim order passed by a Family Court."

9. From the perusal of Section 14 it is observed that a decision given by the family court is appealable provided the said decision is not an interim order as provided in Sub Section 3 of Section 14 ibid. Every order passed during the pendency of a family suit cannot be treated merely as an interlocutory order if the said order finally determines an issue. Reliance in this regard may be placed on the judgment reported as

MUHAMMAD ZAFFAR KHAN versus Mst. SHEHNAZ BIBI and 2 others (1996 CLC 94), the relevant portion is reproduced below:-

"Regarding the first question, I am of the opinion that every order passed by a Family Court during the pendency of a suit cannot be treated interlocutory, unless the nature of such order reflects so. To test whether an order passed on any application by a Family Court be treated interlocutory or not the Appellate Court must find out what possible orders could be passed by the Judge Family Court on such applications. If the nature of an order appears to be final then it may not be treated interlocutory.

.....
 In the light of above discussion, I am of the view that if an order of dismissal or allowance ,

passed on an application in respect of any issue has finally decided the said issue, then such an order possesses the characteristic of finality notwithstanding to the pendency or final disposal of the case on the basis of that order and an appeal against such an order would be maintainable. If no final order regarding an issue has been passed on an application and the point raised by any party has been deferred for the time being, then such order, can be termed as "interlocutory".

It may not be out of place to mention that the words "Interlocutory" in its dictionary meaning means "not final or definitive", pronounced during the course of a suit pending final decision as "an interlocutory divorce decree." (Websters' New Universal Unabridged Dictionary). Therefore, an order passed on an application cannot be treated interlocutory if the Court has given a final or definitive decision on an issue relating to the maintainability of a suit or the jurisdiction of the Court."

10. In case reported as Imtiaz Ahmad Khan vs. Mst.

Aqsa Manzoor and others (PLD 2013 Lahore 241), the question for determination before the Court was maintainability of an Intra Court Appeal under Section 3 of Law Reforms Ordinance, 1972 arising out of suit for maintenance and return of dowry articles on the ground that whether dismissal of application under Section 11 CPC would amount to an appealable decision in terms of Section 14 of the Act or not. The Division Bench declared the dismissal of said application as '*a decision given*' by observing as under:



"The basic question to be resolved is, whether the order dated 12.11.2009 dismissing the petitioner's application seeking the dismissal of respondent's suit is a decision given or an interlocutory order, the two terms used in section 14 of the West Pakistan Family Courts Act, 1964.

The order dated 12.11.2009 impugned in the writ petition was passed on the application made by the applicant. The question whether the court could try the subsequent suit when the earlier one had already dismissed for want of evidence was finally decided vide the above referred order. No further order was to be passed on the said application. The order passed falls within the term of "a decision given". Reliance is placed on Rao Muhammad Owais Qarani v. Mst. Tauheed Aisha and others, 1991 MLD 1097. In view of the ratio of the referred judgment the order assailed in writ petition finally decides the application made by the appellant cannot be termed to be an interlocutory order. It is a decision given and is appealable. The instant Intra Court Appeal arising out of the proceedings whereby the law provides a remedy by way of an appeal or revision is not competent. This appeal is dismissed."

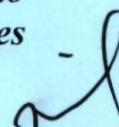
In *Rao Muhammad Owais Qarni's* case (Supra), the question before the Court for determination was whether the order of the trial court in allowing the application filed by a party to recall the witnesses of other party for the purposes of cross examination would amount to '*a decision given*' or not and whether it is appealable. The Court observed as under:

"With regard to the question as to whether or not the impugned order of the learned Court

was appealable, it seems that in view of the several decisions referred to by the parties it is almost settled that the word ‘decision’ used in section 14 of the Act does not include every interlocutory order of the Family Court, but covers only such orders as are passed under some provision of the Act and this, it appears, would imply the final or temporary determination of a matter forming part of some issue involved in the case. Applying this test, the order dated 6.8.1990 passed by the trial Court would, in my view, not be ‘decision’ for purposes of section 14 of the Act and therefore, not appealable.”

In Mst. Naureen vs. Ehsan Sabir, Family Judge, Faisalabad and 2 others (2010 C.L.R. 110), the petitioner wife had challenged the decision of the appellate court whereby her appeal had been dismissed as not maintainable in view of Section 14 of the Act. The matter under consideration before the Court was that whether appeal would be maintainable against an order of the Judge Family Court allowing the husband to resile from his previous offer to decide the case on the basis of oath to be taken by the wife when the offer had been accepted and she was willing to take the oath. This Court observed as under:

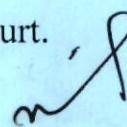
“The word “decision” not only covers the final judgment but also interlocutory order, therefore, in such situation, the appeal would be maintainable while having a look of a different meaning and definition is broad enough to cover both final judgments and interlocutory orders and although, it is sometimes limited to the sense of judgment and sometimes



understood as meaning simply the first step leading to a judgment. Lastly, the word "decision" may include various rulings as well as orders.

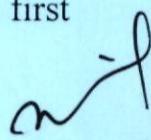
In this case, the offer was made by the respondent to decide the lis on oath but subsequently backed out without any reason. Had the offer made by the respondent been materialized, the case would have been decided either way, therefore, it can safely be held that the act of the respondent is leading to a final judgment, therefore, in any case, it was a decision and the appeal was competent."

11. In the case reported as Nargis Naureen vs. Judge Family Court, Multan and others (PLD 2018 Lahore 735) the question for determination before the Court was whether dismissal of an application for seeking interim relief by the Family Court would be an appealable order, the Court observed that dismissal of application filed under Section 21-A of the Act is tantamount to decline the relief of preservation and protection of property that may be available to a party (if it was otherwise entitled to the same) during the pendency of suit, which amounts to a final determination of a claim to that extent and hence cannot be treated as merely an interlocutory order that does not finally determine anything, thus said order would amount to a decision given in terms of Section 14 of the Act. Consequently, an appeal against the same would be available before the appellate court.



Similar principle has been laid down in the judgments reported as Tasadaq Nawaz vs. Masood Iqbal Usmani and others (PLD 2018 Lahore 830), Rahim Bakhsh vs. Mst. Shahzadi & others (2018 CLC 1789) and Memoona Ilyas vs. Additional District Judge and others (2017 CLC 1747).

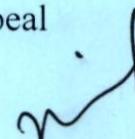
12. There is another aspect of the matter that where an application for interim maintenance allowance filed by or on behalf of the minor is dismissed on merits, the minor whose lifeline depends upon the maintenance allowance provided by his father and is aggrieved of the said order on the basis of any available ground cannot be kept in waiting for an indefinite period for determination of his right to receive maintenance allowance and that too for entire period consumed for decision of the main case. Although this Court has got jurisdiction to entertain the said dispute in its constitutional jurisdiction regardless of availability of alternate remedy of appeal, this Court ordinarily does not exercise such jurisdiction on the ground that the said aspect of the matter may require determination of some disputed facts and the appellate court being empowered to do so should be approached in the first



instance so that the remedy before an available forum may not be lost.

13. Keeping in view the afore-referred verdicts, the position of law that emerges is that appeal under Section 14 of the Act is not barred against every interlocutory order and remedy of appeal, unless specifically barred, would be available against a decision relating to a right or a remedy provided under the law subject to the condition that finality is attached to such an order or decision and nothing remains to be further decided between the parties on the said issue.

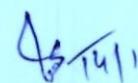
In view of the above, without commenting upon the merits of the case lest the decision of the courts below be affected by the same, it is observed that dismissal of application filed by the petitioner for fixing interim maintenance allowance of the minor under Section 17-A of the Act is tantamount to decline the relief of interim maintenance allowance permissible to the minor during the pendency of suit, which amounts to final determination of claim to that extent and hence cannot be treated merely as an interim/interlocutory order that does not finally determine anything. Thus said order would amount to '*a decision given*' in terms of Section 14 of the Act. Consequently an appeal



against the same would be available before the appellate court in case the minor is aggrieved of the same on any available ground. Hence, this constitutional petition is not maintainable due to availability of alternate remedy and the same is dismissed as such. The petitioner may, if advised, seek remedy by way of filing an appeal before the appellate court. However, before parting with this decision, it is observed that in case an appeal is filed by the petitioner, the appellate court, while deciding the same on its own merits, shall take into consideration the fact that the petitioner had invoked the constitutional jurisdiction of this Court to seek relief under the impression that appeal was barred under Section 14(3) of the Act.

(Muzamil Akhtar Shabir)
Judge

Approved for reporting


Naveed.

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2/1/2019