

**ORDER SHEET**  
**IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD**  
**C.P. NO.S-819 of 2015**

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<b>DATE</b>	<b>ORDER WITH SIGNATURE OF JUDGE(S)</b>
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**Date of Hearing :** 27.02.2018.

**Date of Order :** 27.02.2018.

**Mr. Hakim Ali Siddiqui, Advocate for petitioner.**

**Mr. Khalil-ur-Rehman Pirzada, Advocate for respondent No.1.**

**Mr. Wali Muhammad Jamari, Assistant A.G**

**ORDER**

**AGHA FAISAL, J:** The present petition was instituted in 2015,

wherein the following relief was sought:

- “(a) That this Honourable Court may be pleased to declare/set aside the judgment and decree passed by respondent No.2 dated 12.08.2015 is illegal, suffers from misreading of evidence, illegality and is not based on evidence.*
- “(b) That this Honourable Court may be pleased to declare that grant of Rs.15000/- as maintenance is unjustified and illegal and without determination of quantum of medical expenses on the basis of cogent and positive evidence. Without considering that the petitioner is already paying maintenance of Rs.3600/- per month with enhancement of 10% per annum. The second suit is barred by General Principles of res judicata. The quantum of maintenance was illegally fixed and without iota of evidence.*
- “(c) That the cost of the petition be granted.*
- “(d) That any other relief this Honourable Court deems fit be granted.”*

2. A brief encapsulation of the facts of the present case are delineated herein below:

- (i) The respondent No.1 had filed a suit, for dissolution of marriage, dower, dowry, maintenance and custody of her minor baby girl, against the petitioner, being Family Suit No.16 of 2011 before the Court of IInd Civil & Family

Judge, Nawabshah (hereinafter referred to as the "Trial Court"), and the said suit was decreed in favour of the respondent No.1 herein vide the Judgment dated 25.08.2011.

- (ii) It may be pertinent to reproduce the relevant portion of the aforesaid Judgment herein below:

*ISSUE NO.3. This issue relates to with the custody of minor. Though defendant has raised legal objection in his written statement regarding the jurisdiction of this court but at the time of arguments learned counsel for defendant has conceded the fact that mother is entitled to keep the custody of minor under law of Hizanat and he only prayed for visiting right of defendant. I have gone through the martial available on record. It is settled law that right of custody of minor is not an absolute right rather it is always subject to the welfare of the minor./ the issue before me is to consider the question of custody of minor at this stage because minor Zahra is suckling baby and hardly aged about 11 months. In the light of law laid down by Supreme court and the principles of Islamic law, it is not in the interest and welfare of minor to handover her custody to father at this stage but rather her welfare surely lies with her mother. As above mentioned Zahra is aged about 11 months and it is in her welfare that her custody be remained with her mother at least till she attains the age of puberty. Defendant being father is entitled to meet with the minor. I am of the considered opinion that minor should remain in custody of plaintiff with direction to give access to defendant to meet with Zahra in court on 14<sup>th</sup> of each calendar month for 3 hours and such time will gradually increase by half an hour per year. The issue is decided accordingly.*

*ISSUE NO.4: Now finally question arises as to what reliefs are the plaintiff's entitled. In view of detail discussion, findings on Issues No.1 to 3 and for the reasons recorded herein above, I am of the humble opinion that the plaintiff is entitled for the grant of relief of maintenance for her Iddat period at the rate of Rs.2000/- per month, whereas, minor Zahra is entitled for the grant of maintenance at the rate of Rs.2500/- per month with effect from filing of suit till the age of puberty or marriage with 10% yearly increase until prove otherwise. The claim regarding the remaining dowry articles declined while the custody of minor will remain with mother. Defendant is entitled to meet with minor in court on 14<sup>th</sup> of each*

*calendar month for 3 hours and such time will gradually increase by half an hour per year. Defendant further directed to deposit the Iddat period maintenance as well as past maintenance of minor within 30 days of passing of decree. He is further directed to deposit monthly maintenance of minor on or before 14<sup>th</sup> of each month. The suit of the plaintiff is hereby partly allowed and partly dismissed with no order as to cost.”*

- (iii) Subsequent thereto, the respondent No.1 filed a suit for enhancement of the maintenance for the minor, on account of the expenses required for the medical treatment of the minor, being Family Suit No.269 of 2013 in the court of Family Judge, Nawabshah. The said suit was also decided in favour of the respondent No.1 vide the order dated 25.11.2014.
- (iv) It may be pertinent to reproduce the relevant portion of the aforesaid order herein below:

“4. In order to arrive at a just conclusion brief look at evidence recorded before this court is also of paramount significance. Scanning of evidence record up till now shows that plaintiff and her witnesses have well corroborated their version so far the need of enhance maintenance of medical grounds of minor ailing baby Zahra is concerned. On this point their credit remained un-impeached by the defence during cross. It is crystal clear from the scrutiny of evidence that plaintiff hails from a poor family and her father is truck driver by profession. Plaintiff has been successful to establish that minor baby Zahra aged about one and half year is suffering from chronic disease. Defendant has admitted during his cross examination that he has contracted three marriages. Which proves the factum of his lavish way of life, affluence and prosperity which is contradiction of his stated version. Further defendant witness did not corroborate the defendant’s claim regarding payment of maintenance. He stated in his cross “I do not know whether defendant is paying any medical expenses to ailing minor”. Now here question arises the person who is real brother of defendant how he can be so ignorant of his private state of affairs. Besides there are material contradictions between the statements of defendant and his witness. It is pertinent to mention here that in order to ascertain the financial position of defendant this court appointed a commission

(commission's report is available on record) according to which defendant owns an Electro Shops and deals in sale of new electronic items such as T.V, A.C, Fridge etc. which contradicts the claim of defendant to be a salesman of shop. It would be apt to quote a cardinal principle of law of evidence that *"Man may tell a lie but documents not."* *There is ample material available on the record to conclude that the entire proclivity and demeanor of defendant throughout the proceedings is to somehow by hook or by crook seek the adjournments and to humiliate the plaintiff and to make her suffer from the mental torture and agony of protracted proceedings (since matter pertains to the year 2013) and to aggravate the suffering of ailing and diseased minor child.*

5. *Perusal of record shows that this court fixed the minimum amount of Rs.1000/- as interim maintenance of ailing minor pending adjudication of suit u/s. 17-A of West Pakistan Family Courts Act, 1964 vide order dated 23.09.2014. Thereafter plaintiff moved the application under discussion. Heard advocate for plaintiff, he argued that since the defendant has not only failed to pay interim maintenance of Rs.1000/- in compliance of court's order dated 23.09.2014 but also intentionally avoided and disgrace the order of this court, consequently defendant is amenable to the penal provisions contained in section 17-A of West Pakistan Family Courts Act, 1964, which is reproduced here for brevity and clearance and goes as;*

- a) *In a suit for maintenance of children, shall immediately after filing of the written statement pass order for maintenance; and*
- b) *In any other suit for maintenance, may at any stage of proceedings pass an interim order for maintenance where under the payment shall be made by 14<sup>th</sup> of each month in advance, failing which the court shall strike off the defence*

*[Family Court (maintenance Act, 2008) date 19<sup>th</sup> August, 2009 as passed by the national assembly]*

*On the other hand advocate for defendant opposed the application and contended that order has been challenged before competent forum and section 17-A has not been applied with facts of present case. The applicant has concealed the real facts from court and filed the second suit for enhancement of maintenance. Plaintiff is already receiving Rs.3300/- per month ordered in her first suit by the Civil Judge*

*and JM-II. Matter is already under adjudication and fixed for evidence of defendant side and at this stage suit cannot be decreed and case is ripe up for conclusion hence the application is liable to be dismissed. Keeping in view the foregoing and attending circumstances this court is of the considered view that admittedly willful deliberate or contemptuous disobedience or non-compliance may attract penal consequences of striking off defence of party. Before having recourse to penal action family court should apply its judicial mind to the facts and circumstances of the whole case. In this respect the factum of non-payment of interim maintenance and medical expenses to a disable and ailing child who has no fault of her own for her present condition is cruelty and criminal negligence and should be taken seriously otherwise it would not be out of place to say that such acts of unblushing injustice might well make Words to groan out of his grave. This court is of the considered view that the application under discussion is fit case for attracting the penal consequences enunciated in the provision of 17-A of West Pakistan Family Courts Act given the aforementioned facts of the case and conduct of defendant towards the court proceedings. Hence keeping in view all the circumstances the suit of plaintiff for enhancement of maintenance of ailing and disable minor baby Zahra aged about 1.1/2 years on medical grounds is decreed to the extent of Rs.15000/- (Fifteen thousand only) per month. No order as to the remaining prayers in the suit as the same have already been withdrawn by the plaintiff. Defendant is directed to deposit enhanced maintenance of minor baby on or before 14<sup>th</sup> of every month in this court.*

*Let such decree be prepared and a certified copy be sent to defendant through registered post A/D according to law.”*

- (v) The petitioner then filed an appeal against the aforesaid order, being Family Appeal No.01 of 2015 before the 1st Additional District Judge Shaheed Benazirabad and the same was dismissed vide the Judgment dated 12.08.2015.
- (vi) It may be pertinent to reproduce the relevant portion of the aforesaid judgment, which reads as follows:

*“Learned counsel for the appellant/defendant has argued that the learned trial Court has passed the order for interim maintenance at Rs.1000/- per*

month U/s. 17-A Family Courts Act, 1964, to the minor, but the same has not been deposited or paid by the appellant/respondent as he has already paying maintenance to the minor at the rate of Rs.3300/- per month in previously decreed suit for maintenance, therefore, there was no any need to pay any interim maintenance to the minor and due to that on the application of the learned counsel for the respondent/plaintiff decreed the suit in hest without taking into consideration that the minor has been provided maintenance. Learned counsel has also argued that the suit is not maintainable and the learned trial court has wrongly decreed the suit and prayed for setting aside the order dated 25.11.2014.

On the other hand learned counsel for the respondent/plaintiff has argued that the minor is suffering from mental disease and she has been treated in hospital and in this respect respondent/plaintiff has produced numbers of medical certificate/receipts before learned trial court and on the medical ground the application for maintenance was moved, which is a fresh ground and fresh cause of action and previously the suit was decreed for maintenance of minor at the rate of Rs.3300/-, but now since the minor is not a normal child and is suffering for mental disease, therefore, respondent/plaintiff cannot afford the medical expenses of the minor and the appellant/defendant is father of minor is bound to provide the medical expenses to the minor and therefore, suit was filed and the same was decreed under the provisions of Section 17-A Family Courts Act, 1964.

I have gone through the arguments of learned counsel for the both parties and material brought on the record and so also the evidence recorded by the learned trial court. The suit for maintenance for the minor is filed on the ground of illness of the minor, as she is suffering from mental disease and is a disable child, therefore, in my humble view the father is duty bound to provide proper Medicare and medication to the minor child. Record shows that previously the suit was decreed for maintenance, but in that suit it was not mentioned that the minor was mentally ill and no any medical ground was taken, but this suit was filed only on the ground of illness of the minor, the maintenance is required for medical expenses, therefore, the suit is maintainable. The application U/s. 17-A Family Courts Act, 1964, was moved and learned trial Court has directed the appellant/respondent to pay the interim maintenance at Rs.1000/- per month, but the learned trial court has struck of the defence and decreed the suit U/s. 17-A Family Court Act, 1964. I

would like to reproduce the Section 17-A Family Courts Act, 1964, which reads as under:-

- a) *In a suit for maintenance of children, shall immediately after filing of the written statement pass order for maintenance; and*
- b) *In any other suit for maintenance, may at any state of proceedings pass an interim order for maintenance where under the payment shall be made by 14<sup>th</sup> of each month in advance, failing which the Court shall strike off the defence and decree the suit”*

*In view of the above discussion, I am of the humble view since the appellant/defendant has not complied with the order, therefore, the learned trial Court has rightly struck off the defence and decreed the suit vide order dated 25.11.2014 & decree dated 02.12.2014, which needs no interference, hence, the appeal in hand is hereby stand dismissed. There is no order as to cost.”*

3. The present controversy appears to be confined to the quantum of maintenance of the minor girl, who is stated to *inter alia* suffer from epilepsy and does not have control of her motor skills.

4. The arguments advanced by the learned Counsel for the petitioner in support of his contentions were as follows:

- (i) The learned Counsel for the petitioner has argued that irrespective of the medical condition of the petitioner's daughter, the quantum of maintenance has to be based upon the income and capacity of the petitioner and not upon any other factor.
- (ii) It is contended that the petitioner earns Rs.7000 to Rs.9000/- per month and does not have the means to pay the maintenance awarded by the concerned learned Family Courts.
- (iii) It was further contended that even though the gravity of the medical condition of the minor cannot be denied by the petitioner, as being a father he is well aware of the same, but that the respondent No.1 was unable to prove the said

disability during the successive family suits and hence the question of maintenance should at best be remanded back to the concerned Family Court for re-determination.

5. The learned Counsel for the petitioner has relied on the case of *M. SALEEM AHMAD SIDDIQUI V/S. MST.SABIRA BEGUM & OTHERS*, reported as 2001 YLR 2329, and drew the Court's attention to the following paragraphs:

*"4. The case of petitioner is primarily based on the plea that he draws a salary of Rs.2,838.90 as evidenced by the Salary Slip. It was vehemently contended that the petitioner would not be able to pay the aforesaid amount of maintenance which comes to Rs.4,300 per month. In this context it may be observed that the terms 'salary' and 'income' connote different aspects relating to one's earnings. Salary is the net amount of payment made for a fixed period usually a month, by the employer to the employee, whereas the term income is co-related to the entire earnings including the salary (or salaries iff there are other jobs also) for the said period. No doubt the 'Income' and 'total earnings' cannot be confined to a particular salary, but then, in order to compel particular salary, but then, in order to compel the father to pay an amount of maintenance to his children beyond his salary it should be shown that his earning or say, the income was much more than that.*

*5. The judgment of trial court shows that the petitioner in his cross-examination in the trial court denied that he was doing any part time job. He had also denied that he was receiving rent from tenants to the tune of Rs.3,000/- per month. On the contrary he stated that he was beaten and driven out of the house by his children; and he left the house on 17.11.1997. Obviously, in such a situation the petitioner had to arrange a new accommodation incurring new expenditures. The trial court has, however, taken note of the admission by the petitioner that he used to pay Rs.5,000/- to respondent/plaintiff No.1 when he lived with her. This admission by itself is not enough to establish legitimate income of the petitioner. In the event of denial by the petitioner of any extra source of income the burden shifted to respondents to establish that the quantum of legal earnings of petitioner was much more than he ostensible income. It would be beyond the proportions of law and propriety to presume that the petitioner's admission that he paid Rs.5,000/- to his wife, prove his lawful income.*

6. The learned Counsel then referred to the case of *SYED SALEEM IMTIAZ HUSSAIN* through *Syed Imtiaz Hussain V/S. MUHAMMAD SALIM*



& 02 OTHERS, reported as 2004 MLD 1548, and drew the Court's attention to the following passage:

"I have heard the learned counsel for the parties. Undoubtedly the father is legally and morally bound to maintain his child. One of the criteria for determining the quantum of maintenance, obviously is the income and status of the father, but it does not mean that, by taking the total income of the father and dividing it on some subjective and unknown principles, the Court should grant allowance on unfounded mathematical rule. The Court of law cannot act whimsically and in a capricious manner, but is supposed to find out from the evidence on the record, as to what is the requirement of the minor for the purpose of his subsistence, which means the support to his life; this definitely includes the food, clothing, lodging, education, medical care and some amount for extracurricular activities of the minor etc. Unfortunately, the learned Court below has neither undertaken this exercise, nor it has been so proved by the respondent on the record, that for his subsistence, the amount of Rs.34000/- per month is essential. Moreover, while passing the judgment, under condition No.5, only the amount of 20% of the maintenance allowance of Rs.34,000/- has been directed to be spent upon the minor, which comes to about Rs.7000. Whereas, for the remaining amount of Rs.27,000/-, the mother has been directed to purchase the Defence Saving Certificates in the name of the minor, which shall only be en-cashable, when the minor attains the age of majority. This part of the judgment has not been challenged by the respondents. The above, therefore, clearly shows that the learned Court below in fact has granted Rs.7000/- as maintenance to the minor and this cannot be reduced having been fixed by a Court of competent jurisdiction, but the balance of Rs.27,000/- per month is for his future security. I am not convinced, if the maintenance, which undoubtedly is in the nature of a support allowance meant for the purposes mentioned above, can be equated with the future security of the minor, usable by him after he attains the age of majority. Therefore, such judgment and decree cannot be sustained.

7. Thereafter, the learned Counsel cited the case of *TAUQEER AHMAD QURESHI V/S. ADDITIONAL DISTRICT JUDGE, LAHORE & 02 OTHERS*, reported as *PLD 2009 Supreme Court 760*, and drew the Court's attention to the following paragraphs:

"9. We have given our anxious consideration to the entire facts and circumstances of the case. the minors are entitled to be maintained by the father in the manner befitting the status and financial condition for the father and for this reason the Family court is under an obligation while granting the maintenance allowance, to keep in mind the financial condition and status of the father. It has to make an inquiry in this regard.

*It cannot act arbitrarily or whimsically. Furthermore, at the same time, the unjust enrichment for the minors cannot be permitted at the cost of the father. In the present case, there is nothing on the record to show that the appellant is a rich man and can afford paying at the end, Rs.6.88 crores to the minors towards their maintenance. We have also noticed that the Family Court had no basis before it and had no criteria for awarding 20% annual increase in the maintenance allowance granted by it and it gave no reasons for ordering such an increase. It thus acted arbitrarily, illegally and whimsically in awarding such an exorbitant annual increase in the maintenance allowance. There was no justification for the annual increase of maintenance allowed at the rate of 20%. It was not a reasonable exercise of authority by the Family Court. It is well settled that the judicial officers are required to act justly and fairly and reasonably in discharge of judicial functions. The argument that school fees of the minors are more than the rate of maintenance allowance granted by the Family Court, therefore, the annual increase granted by the Family court should not be interfered with, has also no force. The mother, if she so desires or can afford, may put the children in expensive schools but the father's obligation to maintain the minors is only to the extent of his status and financial condition and the Family court must keep these factors in mind while granting maintenance allowance.*

*10. There is no cavil to the proposition that the executing court cannot go behind the decree but at the same time the executing Court can look into the questions whether the decree or part thereof is executable or inexecutable and if for any reason the decree has become inexecutable, the executing court is empowered to declare so and if a part of the decree is inexecutable and that part is severable from other part(s) of the decree then the executing court is empowered to refuse the execution of the inexecutable part of the decree and may proceed with the execution of the rest of the decree. In the present case, there is nothing on the record to show that the appellant has the means to pay the increase as ordered by the trial Court. As for the future prospects, the minors can always approach the Family court for the increase in the maintenance allowance due to any change in the circumstances. The impugned judgments of the High court and the Courts below are, therefore, not sustainable to the extent of annual increase of 20% in the maintenance allowance of the respondent's minors who shall be entitled only to the 5% annual increase in such an allowance as offered by learned counsel for the appellant, which in our opinion will meet the ends of justice."*

8. The learned Counsel also cited the case of *MUHAMMAD ASLAM V/S. MUHAMMAD USMAN & OTHERS*, reported as 2004 CLC 473, and drew the Court's attention to the following paragraphs:

“6. In view of judgment *M. Saleem Ahmad Siddiqui v. Mst. Sabira Begum and others* 2001 YLR 2329 the salary cannot be attached beyond half of it. Islam does not compel a person to do an act beyond capacity, therefore, social status of the petitioner and level of legitimate financial sources which are eminent factors for deciding the quantum of maintenance shall not be ignored.

“7. In the present case these aspects have not been dilated upon by the learned Courts below with realistic approach not the evidence is appraised with the precision. The petitioner has given oral account of the income of the defendant but she has not produced the evidence. At this stage, the learned counsel for the petitioner submits that he is drawing near about Rs.15,000/- as his salary, therefore, the fixation of quantum of near about Rs.15,000/- per head to my view is not correct and even the maintenance of Rs.5,000/- per head to my view is not correct and even the admission of the petitioner that he used to pay Rs.5,000/- to the plaintiff/wife when she was living with her father, is not enough to establish the legitimate income of the petitioner. The quantum of maintenance is reduced from Rs.5,000/- to Rs.3,000/- per month or each minor.”

9. In view of the foregoing, it was argued by the learned Counsel that *inter alia* the Judgment of the Appellate Court dated 12.08.2015 be set aside and further that the quantum of maintenance payable in respect of the minor be subjected to a fresh determination.

10. In response thereto, the learned Counsel for the respondent No.1 opened his arguments by expressing his regret at the cavalier manner in which the petitioner was seeking to deprive his own sick child of the maintenance that she was entitled to as her judicially determined right.

11. The arguments presented by the learned Counsel for the respondent No.1 may be summated as follows:

- (i) The learned Counsel submitted that the earnings represented by the petitioner are at complete variance to the independently ascertained facts herein. It was stated that the Family Court had commissioned an independent assessment of the financial position of the petitioner and

the report in respect thereof was duly filed therewith, dated 31.05.2014. It may be pertinent to reproduce the relevant content of the said report herein below:

*"I was appointed Commissioner by the Hon'ble Court to inspect and assess the financial position of the plaintiff as well as the defendant. IN compliance of the orders of the Hon'ble Court I served notices on the learned Advocates of the parties Mr. Khalil-ur-Rehman Pirzada and Mr. Mehmood Vistro, however Mr. Mehmood Vistro did not receive the notice and talked to him on phone, on which he said that he does not want to be present at the time of visit.*

*On 25.5.2014 I went to Sanghar on the shop of defendant and met with defendant Ghulam Murtaza and his brothers Ghulam Mustafa and Farooq at about 1200 noon. It was Electronic Shop in the name and style of Al-Murtaza Electronics Sales and Service, situated on M.A Jinnah Road [which is main road of Sanghar City] and such large sign board was affixed in the name of defendant on the shop. Refrigerators, T.Vs, Washing Machines, Air coolers, Fans, Sewing Machines, Juicers, Irons etc were lying the shop for sale. The shop was a big shop. ON enquiries I was informed by the defendant that he is servant on the shop, but the ways, manners and the trend showed that he himself is the owner of the shop. In this regard, I also made enquiries from the adjoining shopkeepers and I was told that the defendant himself is running his own business in the name and style of Al-Murtaza Electronics Sales and Service in the shop we were present. However, during conversation it came to light that they also have godown, on which I insisted to see the Godown, and there-after brother of defendant took me in his Cultus Car to the Godown in Makhi Market, where I saw that a Board was affixed in the name of Al-Murtaza Electronics. The godown was filled with electronic items of different companies, which include, Refrigerator, 20-25 Washing Machines of various companies. During conversation it also came to light that there is another shop which is in the name of Mehmood brother of defendant. It also came to light that there is also a repairing shop on Kiyani Road which is being run by Farooq brother of defendant. The defendant disclosed that they are 5 brothers and live jointly. However, during conversation Mustafa brother of defendant brought one person and stated that he is Malak Kabeer and his investor and have invested Rs.10,00,000/- in the business. Farooq brother of defenant admitted that they own a Mehran Car for their use. I insisted to visit their house and other shops, but they avoid to show their house and shops and refused bluntly. I also demanded vouchers and visiting card of the shop and of the defendant, but the*

*defendant refused to give anything. I then took some snaps/photographs of the shop in question.*

*I then came back to Nawabshah and went to the house of parents of plaintiff and met with Irshad Ahmed father of plaintiff and her uncle Mushtaque Ahmed and made enquiries from them, where I came to know that Irsahd Ahmed father of plaintiff is a Truck Driver while her uncle Mushtaque Ahmed is Sales Officer in State Life Insurance Company. Father of plaintiff disclosed that he is drawing salary of Rs.10,000/- as Truck Driver and also take Bhatta [Daily Expenses] of Rs.500/- on the day of duty, while Mushtaque Ahmed disclosed that his monthly income is around Rs.30,000/- to 35,000/-, while plaintiff has two other unmarried sisters and have three brothers, while they are living jointly in their house situated in Katchi Abadi Madani Baloch Colony, Line Par, Nawabshah.*

*From the above, I feel that the defendant is a well to do person and is running his own business of electronics and he alongwith his brothers is living jointly, while the parents of the plaintiff are persons of average standard.*

*Photographs of defendant and his shop 7 in Nos. are enclosed herewith for the perusal of the Hon'ble Court.*

*The above is submitted as ordered by the Hon'ble Court."*

- (ii) In view of the foregoing, it was contended by the learned Counsel that the quantum of maintenance apportioned by the successive judgments was well within the means of the petitioner.
- (iii) The learned Counsel then referred to Section 17-A of the Family Courts Act, 1964, and stated that the precepts of the same had been duly enforced by the concerned Court. It is pertinent to reproduce the contents of the said provision of the law, which stipulates as under:

*S. 17-A. Interim order for maintenance.—At any stage of proceedings in a suit for maintenance, the Family Court may pass an interim order for maintenance, whereunder the payment shall be made by the fourteenth of each month, failing which the Court may strike off the defence of the defendant and decree the suit.*

*Proposed Amendment Substituted S. 17-A*

- a) *In a suit for maintenance of children, shall immediately after filing of the written statement pass order for maintenance; and*
  - b) *In any other suit for maintenance, may at any stage of proceedings pass an interim order for maintenance where under the payment shall be made by 14<sup>th</sup> of each month in advance, failing which the court shall strike off the defence. [Family Court (maintenance Act, 2008) date 19<sup>th</sup> August, 2009 as passed by the national assembly].*
- (iv) The learned Counsel argued that the word “shall” is used when mandating the payment maintenance under an interim order and further argued that the said statutory provision duly required the concerned Court to strike of the defence of any independent decree in the suit in the event that such a payment was not made.
- (v) The learned Counsel argued that the minor girl child suffers from epilepsy and is virtually paralyzed. It was further submitted that the child requires round the clock adult supervision as she is unable to take care of herself.
- (vi) It was further stated that the expenses for the medical and supervisory care of the minor for exceeds the quantum of maintenance, which has been ordered by the successive judgments.

12. The learned Counsel for the respondent No.1 cited the case of *FAZLUR REHMAN V/S. MST. SHAZIA BIBI & 02 OTHERS*, reported as *2015 CLC 116* in support of his proposition that the concurrent findings of facts given by two Courts below should not ordinarily be interfered with by High Court in exercise of its constitutional jurisdiction.

13. The learned Counsel also cited the case of *MUNAWARL RASUL V/S. HAFSA RASUL & 02 OTHERS*, reported as *2011 MLD 991*, and drew the Court’s attention to the following passage:

*“7. The minor daughters of the petitioner were allowed interim maintenance @ Rs.2,000/- per head per month by the court vide order dated 15.12.2009 which was effective from the month of December, 2009 and onward till the decision of main suit. Perusal of the order sheet reveals that the petitioner has not paid interim maintenance to his daughters for the month of March, May, July, August November, 2010. On the pointation of the learned counsel for the respondents Nos.1 and 2, learned Judge Family Court vide order dated 15.09.2010, directed the petitioner to pay the total outstanding interim maintenance allowance to the respondents on the next date of hearing i.e. 27.09.2010. However, this order was taken very lightly by the petitioner. He neither complied with this order and also became absent from the court on 15.11.2010. Consequently his right to defend was struck off by the learned Judge Family court Lahore vide order dated 15.11.2010. The order passed by the learned Judge Family Court is admittedly within its authority under section 17-A of the West Pakistan Family Courts Act, 1964,*

*Learned counsel for the petitioner failed to point out any illegality or infirmity in the impugned orders dated 15.11.2010 and 24.12.2010 passed by the learned Judge Family Court Lahore calling for interference by this Court in exercise of its constitutional jurisdiction. The writ petition is, therefore, not maintainable and the same is dismissed in limine.”*

14. The learned Counsel then cited the case of *MUHAMMAD ASHRAF V/S. MST. NUSRAT BIB & 03 OTHERS*, reported as 2010 CLC 1411, in support of his argument that no bar existed on a second suit for enhancement of maintenance in the wake of increasing financial requirements of the minor, and drew the Court’s attention to the following paragraphs:

*“9. From a perusal of the record and the evidence, it transpires that the petitioner owns 8/10 acres of land and has two buffaloes. His financial situation has been found by both the learned courts to be sound enough to be able to afford payment of a sum of Rs.3,000 per month to the respondent in order to meet the requirements of his day to day living. The petitioner did not produce any evidence to show that his financial resources were not enough to sustain payment of Rs.3,000/- to his child. Even otherwise, the learned counsel appearing on behalf of the petitioner has not seriously contested payment of the aforesaid amount to the minor.*

*10. As far as the quantum of medical charges for treatment of the minor is concerned, much stress has been laid by the learned counsel for the petitioner on the point that the learned subordinate courts misread the evidence on record. He has*

pointed out that the amount incurred on the treatment of the minor did not exceed Rs.30 to 35 thousand and the amount awarded by the learned subordinate courts is excessive and not sustained by the record.

11. I have gone through the evidence produced before the learned trial Court relating to the treatment and medical expenses for the minor. It is noticed that the minor had a cardiac problem and was taken to various specialists in Sargodha, Mandi Bahauddin, Armed Forces Institute of Cardiology at Rawalpindi and ultimately underwent cardiac surgery at the Punjab Institute of Cardiology at Lahore. The documents produced include receipts for purchase of medicines as well as other material ordered by the Punjab Institute of Cardiology for the purpose of the surgical procedure. The receipts produced duly support the judgment and decree of the learned first appellate court, which has arrived at the figure of Rs.1,00,000/- after due application of mind, examination of the record and the documents produced by the parties.

12. As far as the earlier suit filed on behalf of the minor is concerned, it has been pointed out that the same had been decreed and a sum of Rs.400 was directed to be paid by way of maintenance to the minor. It has been argued that the said suit constituted a bar against filing of the subsequent suit. I am afraid, I do not agree with the argument raised by the learned counsel for the petitioner. There is no bar in law against filing a subsequent suit for enhancement of the maintenance allowance in the wake of changed circumstances and additional needs of the minor, which a father is under a legal and moral obligation to provide.

13. This is a family suit, therefore, the provisions of Code of Civil Procedure are not applicable *stricto sensu*. I, therefore, hold that the second suit was not barred. I have also heard the learned counsel for the respondents, who have filed separate petitions (being decided through this single order). The learned counsel has argued that the suits of the respondents were liable to be decreed as prayed for.

14. The learned counsel for the parties have not been able to convince me that the learned subordinate courts have, in any manner, exceeded their jurisdiction, committed any illegality or material irregularity in arriving at their conclusions. Consequently, while upholding the judgment and decree of the learned first appellate court, these petitions are found to be without merit and are accordingly dismissed.”

15. The learned Counsel contended that the petitioner was merely attempting to prolong the legal proceedings in avoidance of his legal obligation to pay maintenance for his sick child and the present petition was merely a ploy in this regard.



16. The learned Counsel cited the case of *ABID HUSSAIN V/S. MISS SADIA LUQMANI, CIVIL/JUDGE FAMILY COURT, MULTAN & 02 OTHERS*, reported as *2010 YLR 960*, and drew the Court's attention to the following passage:

*"I find no illegality or irregularity in the impugned order dated 4.6.2009 passed by Judge Family Court. Petitioner did not file the appeal against the judgment and decree, thus, the judgment and decree dated 4.6.2009, attained the finality, present objection petition is filed just to prolong the matter to avoid payments, till passing of this order petitioner did not pay single penny to the respondent or his minor son, Muhammad Noshairwan. The Executing Court rightly dismissed.*

5. *Resultantly , this writ petition is dismissed in limine."*

17. It was argued by the learned Counsel for the respondent No.1 that this Court may be pleased to dismiss the petition as the same is borne out of *malafide* considerations of the petitioner and that the same is meritless in law and baseless in fact.

18. This Court has given due consideration to the arguments of the learned Counsel and has reviewed the record including the three successive judgments favoring the respondent No.1.

19. It is the considered view of this Court that the petitioner has not been able to point out a single infirmity in the judgment of the Appellate Court dated 12.08.2015.

20. The contention of the petitioner regarding the inadequacy of his financial means is duly rebutted by the commissioner's report, which is available on record before this Court and was also relied upon by the learned Family Court.

21. The authorities cited by the learned Counsel for the petitioner, reported as *2001 YLR 2329, PLD 2009 Supreme Court 760, 2004 MLD 1548 and*

2004 CLC 473, state that the means of a person has to be factored in when the apportionment of maintenance is taking place. The same appear to have been undertaken judiciously by the Family Court while determining the quantum of maintenance payable by the petitioner herein.

22. In view of the foregoing, it is the considered view of this Court that the judgment of the Appellate Court dated 12.08.2015 is in due consonance with the law and does not merit any interference under the constitutional jurisdiction of this Court or otherwise. Accordingly, this petition was dismissed vide a short order dated, 27-02-2018, which read as follows:

*“Heard learned Counsel at considerable length. This Court is grateful to each of the two learned Counsel for the assistance rendered. For the reasons to be recorded later on, the subject petition alongwith listed applications, is dismissed.”*

23. These are the reasons for the short order, dated 27-02-2018, wherein the instant petition was dismissed.

**JUDGE**

Shahid