Order Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Const. Petition No.S-292 of 2021

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE.

1. For hearing of main case.
2. For orders on CMA No.6483/21

Date of hearing.
28.03.2022

Mr. Mushtaque Ahmed Shahani Advocate for petitioner.

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O R D E R

ARSHAD HUSSAIN KHAN, J.- Through instant constitutional petition, the petitioner-Dr. Habib-ur-Rehman Arain has called in question the concurrent findings of facts of two courts below viz. *(i)* Judgment & Decree dated 04.05.2021, passed by Senior Civil/Family Judge, Mehrabpur, in Family Suit No.35 of 2021 (Old Family Suit No.93 of 2019) whereby the suit of the plaintiff/ respondent No.1 for maintenance was decreed and *(ii)* Judgment & Decree dated 30.11.2021 and 03.12,2021, passed by Additional District Judge (MCAC) in Family Appeal No.28 of 2021 whereby the appeal preferred by the present petitioner/defendant against the judgment and decree, passed in Family Suit No.35 of 2021 was dismissed.

2. Briefly, the facts giving rise to instant petition are that plaintiff/ respondent No.1-Baby Mariam through her mother filed F.C suit No.35 of 2012 [Re-Baby Mariam v. Dr. Habib-ur-Rehman] for maintenance. It has been stated that Dr. Habib-ur- Rehman and Rabia Bibi (the mother of plaintiff) contracted marriage at Mehrabpur on 10.12.2007 and out of said wedlock the plaintiff (Baby Mariam) was born on 09.01.2009. The petitioner/defendant-Dr. Habib-ur-Rehman who is doctor by profession after marriage was posted at Okara Liaqatpur Punjab and during his posting he used to come at his residence of Mahrabpur where the plaintiff along with still resides. Initially, the petitioner used to pay the

maintenance for some year, however, subsequently he stopped paying the same and thereafter when the petitioner refused to pay the maintenance the plaintiff/respondent No.1 through her mother filed Family Suit for maintenance with the following prayer:

> *i) Monthly maintenance of Baby Mariam at rate of Rs.10,000/- in future with enhancement according to dearness in prices.*
>
> *ii) The guardian of baby Mariam also demands past maintenance for last three years for the year, 2016, 2017, 2018 at the rate of Rs.7000/-, Rs.8000/- and Rs.9000/- per month.*
>
> *iii) Any other remedy, which this Honourable Court deems proper according to circumstances of this case, may also be awarded to minor baby Mariam.*

3. The suit, after a full-dressed trial, was decreed in favour of the plaintiff/respondent No.1, vide judgment dated 04.05.2021. The said decree was subsequently challenged by the petitioner/defendant in Family Appeal No.28 of 2021, which was maintained by learned Additional District Judge (MCAC), Kandiaro, vide judgment dated 130.11.2021. The petitioner, thereafter, filed present petition challenging the judgments and decrees of both the courts below.

4. Learned counsel for the petitioner has contended that the judgments and decrees, impugned in the present proceedings, are bad in law, equity and against the basic principles of sharia as well as ignorance of facts and material available on the record. He has argued that the petitioner neither contracted marriage with the mother of Respondent No.1 nor respondent No.1 is her daughter. It is further contended that judgments and decrees impugned in the preset proceedings have been passed by both the learned courts below by ignoring the evidence available on the record. Lastly, he has prayed for setting aside the impugned judgments and decrees.

5. I have heard the arguments of learned counsel for the petitioner and perused the material available on the record.

In the present proceedings the petitioner has assailed the concurrent findings of two courts below. From perusal of the record, it appears that learned trial court has elaborately discussed each and every issue of the matter in its judgment. Relevant portion of the judgment is reproduced as under:-

"Keeping in view I am of the opinion that in our society mostly male dominant society and women always suffers in the present case the plaintiff lady has dared not only to approach the Court of Justice, but ready to face the consequences for the society she was married no doubt it seems from the evidence secretly by the defendant and after some time baby was born rather she was owned and given parental status to the minor defendant totally denied from spare not only to pay maintenance to the minor which was born from this wedlock there is minor technicalities about the Molvi Anus that plaintiff herself taken name about Nikah solemnized by Moulvi Anus, but in my opinion it is big Madarsa as evidence also come on record that was Madarsa of Molvi Anus well known even though after expired of Moulvi Anus same is called by his name, but there are so many other Nikah Khuwan in the same Madarsa who can be Nikah Khuwa/registered. The evidence of the brother of the defendant not only to prove the claim of the plaintiff, but also the brother of defendant Khalil Rehman stated that all family members are also agreed that minor Baby Mariam is daughter of defendant and totally resembles with the defendant as such thing was also recorded by my predecessor Baby Mariam is very resembles with the defendant. The colleagues of the defendant even restrained/pressurized but deposed in favour of plaintiff and even though they were cross examined but could not shaken and all remained same footing that baby Mariam is daughter of defendant the birth certificate also very much clear that baby Mariam is daughter of defendant even now days the whole world very much recognized the process of DNA which is also very much clear that defendant is biological father of the baby Mariam therefore, there is no room from denying of the wedlock or parental status as it is crystal clear that from this wedlock baby Mariay borm from Dr. Habib-ur-Rehman with Rabia Bibi, therefore, the plaintiff successfully proved her case this issue and minor baby Mariam is entitled for maintenance of Rs.10,000/- per month since filing of this suit and onward till attained her majority/marriage.

Issue No.3. In view of above discussion and findings the suit of plaintiff is decreed. The claim of plaintiff for entitlement of her minor maintenance allowed, while defendant is directed to pay maintenance of minor namely Baby Mariam at rate of Rs.10,000/- (Ten thousand) per month from filing of suit till this date and for future period at the same rate with 10% annual increment. Maintenance of minor above named will continue till her attaining age of majority/marriage. Defendant is directed to pay maintenance of minor as aforesaid regularly to plaintiff till 14th of each calendar month".

[Emphasis supplied]

The above said judgment and decree was subsequently, upheld by learned Additional District Judge (MCAC), Kandiaro, vide judgment dated 13.11.2021 in Family Appeal No.28 of 2021. Relevant portions whereof for ease of reference is reproduced as under:

"Besides above, as per section 146 and 149 of Majmoo-e-Islam, edited by Dr. Tanzeel-ur-Rehman, the evidence of women is sufficient to prove the parentage of a child. In this context I have taken guidance from the case law reported in PLD 2008 Lahore 302. In this case the evidence of the mother of respondent/plaintiff baby Mariam was recorded. No doubt the learned counsel for the appellant/defendant raised objection on DNA Test after lapse of one month and submitted that DNA test may be conducted from another laboratory. So far as the contention of learned counsel is concerned, it is an admitted fact that in the present case the DNA test was conducted by mutual consent of both the parties, even the charges of DNA test were equally borne by them. Under these circumstances, both parties cannot be allowed to affirm and disaffirm from their consent. It is settled law that a man cannot approbate and reprobate, as Doctrine of estopple would come into play.

In view of the above discussion and circumstances, I am of the opinion that the appellant /defendant is father of respondent/plaintiff baby Mariam and husband of Mst. Rabia Bibi. Considering the aforesaid facts and circumstances, it has come on record that the appellant /defendant being father of minor baby Mariam is legally bound to maintain her till her entitlement as per law. No doubt, the quantum of maintenance allowance is to be determined keeping in view of the income of appellant/defendant who is serving as Medical Officer but in this case actual income has not been sufficiently proved by either side. Therefore, I am of the view that learned trial court has rightly decreed the maintenance allowance to extent of minor Baby Mariam at the rate of Rs.10,000/- (ten thousand rupees) per month from filing of the suit till date of decree and for future period at same rate with 10% annual increase till her entitlement. Hence the point No.1 is answered in affirmative.

Point No.2

In view of above discussions and circumstances, I am of the humble opinion that the learned trial Court has rightly decreed the maintenance allowance to extent of minor Baby Mariam at the rate of Rs.10,000/- (ten thousand rupees) per month from filing of the suit till date of decree and for future period at same rate with 10% annual increase till her entitlement. I do not find any illegality or irregularity in the impugned judgment and decree, which is hereby maintained and the instant family appeal-in-hand is hereby dismissed with no order as to costs."

6. Since legitimacy of a child (respondent No.1) has been established to be a daughter of petitioner / defendant, therefore, it is duty of the petitioner to maintain her according to his financial status. In this regard, learned family court has settled the maintenance amount for respondent No.1, keeping in view the financial status of petitioner / defendant. In view of above position, the concurrent findings by the two courts below, based on facts and sound appreciation of evidence, available on

record, cannot be set at naught by this Court under writ jurisdiction unless it is proved that the same are perverse, erroneous and against the existing record, which in the present case has not been done.

7. Even otherwise, a constitutional petition cannot be considered as an appeal against the orders passed by first appellate court. In the present case, the petitioner after availing the remedy provided under the law cannot claim that he is left remediless. In these circumstances, the case of the petitioner is that since "there is no alternate remedy is provided by law, therefore, he has filed the present constitutional petition and this practice has always been disapproved by the Apex court in number of judgments. In this context, one may be referred to the following observations of the Honourable Supreme Court in the judgment reported as *Muhammad Hussain Munir and others v. Sikandar and others* [PLD 1974 SC 139].

> *"It is wholly wrong to consider that the above constitutional provision was designed to empower the High Court to interfere with the decision of a court or tribunal of inferior jurisdiction merely because in its opinion the decision is wrong. In that case, it would make the High Court's jurisdiction indistinguishable from that exercisable in a full-fledged appeal, which plainly is not the intention of the constitution-makers."*

8. It is also well established that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the framework of the Constitution, and if there is any error on the point of law committed by the courts below or the tribunal or their decision takes no notice of any pertinent provision of law, then obviously this Court may exercise its constitutional jurisdiction subject to the non-availability of any alternate remedy under the law. This extra ordinary jurisdiction of High Court may be invoked to encounter and collide with extraordinary situation. This constitutional jurisdiction is limited to the exercise of powers in the aid of curing or making correction and rectification in the order of the courts or tribunals below passed in violation of any provision of law or as a result of exceeding their authority and jurisdiction or due to exercising jurisdiction not vested in them or non-exercise of jurisdiction vested in them. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to foster justice in aid of justice and not to perpetuate injustice. However, if it is found that substantial justice has been done

between the parties then this discretion may not be exercised. So far as the exercise of the discretionary powers in upsetting the order passed by the court below is concerned, this Court has to comprehend what illegality or irregularity and/or violation of law has been committed by the courts below, which caused miscarriage of justice. Reliance is placed on the case *Muslim Commercial Bank Ltd. through Attorney v. Abdul Waheed Abro and 2 others* ***(2015 PLC 259)***.

9. The upshot of the above position is that no illegality, irregularity or jurisdictional error, in the concurrent findings of the learned courts below, which resulted into the impugned judgments and decrees, could be pointed out or observed. Resultantly, instant petition being devoid of any force and merit is **dismissed** in *limine* along with all listed applications.

JUDGE

Ihsan.