

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Const. Petition No.S-111 of 2023

(Lashkar Ali v. Mst. Azizan Khatoon)

Petitioner : Lashkar Ali through Mr. Noor Muhammad Laghari, Advocate.

Respondent : Nemo.

Date of hearing : **10.07.2023**

Date of Decision : **10.07.2023**

ORDER

AMJAD ALI BOHIO, J:-This constitutional petition is directed against the order dated 21.02.2023, passed by the Court of Civil Judge/Family Judge in Family Suit No.10/2023 (Re-Mst. Azizan Khatoon v. Lashkar Ali Maitlo). The impugned order allowed the respondent's application under Section 17-A of the West Pakistan Family Courts Act, 1964 ("Act") and directed the petitioner to provide interim maintenance allowance to the respondent at a rate of Rs.10,000/- per month. Additionally, the petitioner was also directed to pay Rs.7000/- per month for the support of their minor son, Rehmat Ali. The order further stated that the payments should be made by the 14th of each month. Failure to comply with this directive, may result in the striking off the petitioner's defense and granting a decree in favor of the respondent.

2. The counsel representing the petitioner was instructed by the court to identify any illegalities or irregularities in the challenged order. Additionally, the counsel was asked to argue on the maintainability of a Constitutional Petition against an interim order passed by a Family Court, considering the provisions outlined in Section 14(3) of the West Pakistan Family Courts Act, 1964.

3. The counsel for the petitioner has argued that the petitioner was not given the opportunity to file objections regarding the application made under Section 17-A of the Act. It is contended that the trial court solely relied on the appearance of the petitioner to make a decision on the application. The counsel further states that the trial court did not consider the arguments raised by the petitioner's counsel and hastily fixed huge amount for interim

maintenance. Finally, it is argued that the present petition is maintainable and that the impugned order should be overturned.

4. The provision of section 17-A of the Act itself provides that the order for interim maintenance shall be passed on the first appearance of the defendant and there is no necessity for filing objections on such application. Here I would like to reproduce section 17-A of the Act as under:

“17-A. ¹Interim 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.”

5. Bare reading of the reproduced section clearly states that in a suit for maintenance, the Family Court shall determine interim monthly maintenance for the wife or child on the first appearance of the defendant. If the defendant fails to pay the maintenance by the 14th day of each month then defendant's defense shall be struck off, and the Family Court may decree the suit for maintenance based on the averments of the plaint and other supporting documents on record.

6. Therefore, according to the language of Section 17-A, there is no necessity to file objections on the application for interim maintenance. The order for interim maintenance is meant to be passed on the first appearance of the defendant and failure to comply with the maintenance payment, may result in the striking off of the defendant's defence and pass a decree in favor of the plaintiff. In light of such provision, the petitioner's argument regarding the lack of opportunity to file objections may be difficult to sustain, as Section 17-A specifies the procedure for determining interim maintenance without mentioning the filing of objections.

7. The impugned order in the present Constitutional Petition is acknowledged to be an interim order. It is important to note that the scope of a Constitutional Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is limited unless any infirmity or illegality in the Family Court's findings while passing the impugned order is identified.

8. The use of the word "shall" in the amended Section 17-A of the Act, where "may" has been replaced, indicates the legislative intent. It suggests

1. Inserted by Ordinance No. LV of 2002 dated 01-10-2002

that in the event of non-compliance with the order for payment of interim maintenance within the prescribed time, not only will the defense shall be struck off, but as a consequence, the suit will be decreed. Therefore, it is observed that the Family Court did not commit any form of illegality that resulted in blatant injustice to the rights of either party, as the petitioner is obligated to provide maintenance to his wife and minor son.

9. According to Muslim Law, a father is responsible for maintaining his son until the son reaches adulthood. However, he is obligated to maintain his daughter until her marriage and until she goes to her husband's home. The term "Nafqah," derived from Arabic refers to spending for a good purpose. It encompasses the expenditure incurred to support one's family including food, clothing, accommodation and other necessary expenses.

10. It may be noted that the Family Court should exercise caution when determining interim maintenance as the Family Courts (Amendment) Ordinance No. LV of 2002 states that interim maintenance orders are tentative in nature and can be varied or enhanced. These orders do not have any bearing on the final order. Therefore, it is essential for the Family Court to carefully consider and determine the interim maintenance amount.

11. The petitioner, in this case, has failed to demonstrate any illegality or substantial irregularity in the impugned order passed by the Family Court, despite being given an opportunity to justify their arguments. Upon filing the present Constitutional Petition under Article 199 of the Islamic Republic of Pakistan, the petitioner was required to satisfy the court for challenging the aforementioned interim order. It is worth noting that the West Pakistan Family Courts Act, 1964 explicitly states that no appeal or revision can be made against an interim order passed by a Family Court, as specified under Section 14(3) of the Act which is referred for ready reference as under:

“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)-----

(b)-----

(c)-----

(d)-----

(e)-----

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

12. The Act of 1964, being a specific and special law, clearly prohibits the remedy of appeal or revision against an interim order. Therefore, when a statute explicitly bars a particular remedy, a petition filed under Article 199 of the Constitution cannot be considered maintainable against that specific order as allowing such petitions in every case would undermine the legislative intent and frustrate the express provision of the law.

13. In the present case, the petitioner relied on Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, solely on the basis that the decision of the trial court was incorrect. However, since the Act of 1964, being a special law, specifically bars the remedy of appeal or revision against an interim order, it can be easily understood that the remedy provided under Article 199 of the Constitution is not maintainable. In this regard, law is well settled in the case of (1) Mst. Isbah Rashid v. Additional District Judge, Islamabad-West and 2 others (**2021 CLC 1089**) which reads as under:

“7. The Act of 1964, being a special law, explicitly bars remedy of appeal or revision against interim order, therefore, when a statute specifically excludes a remedy, petition in terms of Article 199 of the Constitution cannot be held to be maintainable against the said order as it would amount to circumvent the intention of the legislature and frustrate the express provision of law. In "Dr. Samina Anayat v. Additional District Judge and others" (2018 MLD 448 Lahore), the Hon'ble Lahore High Court was of the view that:-

"Perusal of section 14(3) of West Pakistan Family Court Act, 1964, shows that no appeal or revision shall lie against an interim order passed by a Family Court. The Act has explicitly barred the remedy of appeal or revision against such an order, therefore, in case a constitutional petition is entertained against such an order, it will amount to circumvent the intention of the legislation and to frustrate the express provision of law. Reliance in this respect is placed upon Muhammad Anwar Khan v. Mst. Yasmin Zafar (1987 SCMR 2029), Ms. Quratulain Aleem v. Muhammad Rehman Khan and another (2006 YLR 2604) and Mst. Noor Jehan alias Tasleem Begum v. Muhammad Arshad and another (1986 CLC 442).

Since the impugned order is an interlocutory order and against such an order constitution petition cannot be filed, therefore, the petition before this Court is not maintainable. The learned Additional District Judge has rightly observed in the appeal that appeal or revision against interlocutory matters is not maintainable."

14. The learned counsel representing the petitioner has not contested the jurisdiction of the Family Court, and it is acknowledged that he was given an opportunity to present his arguments before the passing of the impugned order. However, the counsel has failed to identify any illegality or material irregularity committed by the Family Court while passing of the impugned order. Therefore, admitting the present petition against the interim order would amount to defeating and diverting the intention of the legislature, as stated in the case of *Syed Sagheer Ahmed Naqvi v. Province of Sindh through Chief Secretary S & G A D, Karachi and others* (1996 S C M R 1165), which was also referred to in the case of *Abrar Hussain v Mehwish Rana and 3 others* (PLD 2012 Lahore 420). In these cases, it was observed that allowing such petitions would go against the legislative intent as specified as under:

"As discussed earlier, the impugned order can neither be termed as void, ab initio nor without jurisdiction. Similarly, the impugned order has not attained the status of a final order. The impugned order was passed by the learned Judge Family Court, Lahore, who has the jurisdiction to pass the said order under section 17-A of the West Pakistan Family Courts, Act, 1964. The petitioner has not challenged the jurisdiction of the learned Judge Family Court, Lahore in his written statement filed before the learned trial court. He was not condemned unheard and was provided an opportunity of hearing before passing the impugned order. The quantum of interim maintenance allowance was prima-facie rightly fixed by the learned Judge Family Court, Lahore, while keeping in view the status of the parties and expenses of the minors. The learned counsel for the petitioner is unable to point out any patent illegality or material irregularity in the impugned order, therefore, the instant petition, which has been filed against an interim order passed by a Court of competent jurisdiction, after providing an opportunity of hearing to the parties, is not maintainable in the eyes of law."

15. It is indeed a well-established legal principle that if an interim order is not appealable and is expressly barred, the aggrieved party should wait for the final order. After the final order is passed, the party may then challenge both the interim and final orders in an appeal before the appellate

court. This principle was affirmed in the case of President All Pakistan Women Association, Peshawar Cantt. v. Muhammad Akbar Awan and others (2020 S C M R 260), where it was held that if a statute expressly bars a remedy that is not available to a party under the statute, it cannot be indirectly sought through the constitutional jurisdiction of the High Court.

16. In fact, the enactment of Section 17 of the Act aims to facilitate the expeditious settlement and resolution of disputes. The objective of the Act is to minimize technicalities and resolve disputes before the Family Court in the shortest possible time and manner. This is further supported by the introduction of Section 12-A in the year 2002, which pertains to the expeditious disposal of cases.

“[12-A. Cases to be disposed of within a specified period.—A Family Court shall dispose of a case, including a suit for dissolution of marriage, within a period of six months from the date of institution.”

17. Based on the settled principles as discussed above, it appears that the Family Court has the authority to review its earlier order for the grant of interim maintenance if it fails to decide the suit within the stipulated period of six months due to delays caused by the respondent. This provision allows the Family Court, either on its own motion or upon application by the petitioner, to review the earlier order.

18. Therefore, based on the discussion and after considering the argument, the present petition being devoid of merits is **dismissed** along with pending application(s).

JUDGE