

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-159 of 2024

[S.M. Kamal Shamimv.....Syed Muhammad Ahmed Kamal]

Date of Hearing : 13.02.2024
Petitioner through : Mr. Javed Haleem, Advocate.
Respondent through : N.R.

ORDER

Zulfiqar Ahmad Khan, J:- This petition challenges successive judgments in favour of respondent rendered by learned Family Judge-XXIX, Karachi East in Family Suit No.1287 of 2018 and Judgment dated 08.11.2023 passed by learned Additional District Judge-X East Karachi in Family Appeal No.199/2022.

2. The respondent being son of the petitioner filed a family suit bearing No.1287/2018 before learned Family Judge East Karachi for recovery of maintenance and educational expenses which was decreed by the learned trial Court vide Judgment dated 04.07.2022. The petitioner impugned the said judgment of the learned trial Court before the Appellate Court by filing Family Appeal No.199/2022 which appeal of the petitioner was dismissed, hence the petitioner is before this Court against the concurrent findings.

3. Since this is a fresh petition and fixed before the Court in a category of “Fresh Case”. Learned counsel was confronted with the maintainability hereof as the Apex Court disapproved of agitation of family matters in writ petition, however, the counsel remained unable to demonstrate the existence of any jurisdictional defect meriting recourse to writ jurisdiction. The crux of the argument

articulated was that the evidence was not appreciated by the respective forums in its proper perspective, hence, the exercise be conducted afresh in writ jurisdiction since no further provision of appeal was provided in the statute.

4. I have heard the arguments of learned counsel for the petitioner and examined the available record. In Pakistan, issues related to child maintenance are dealt with by the Muslim Family Laws Ordinance, 1961, and the West Pakistan Family Courts Act, 1964. However, these laws do not provide a specific definition for “maintenance”. For better understanding it is suitable to rely on the dictionary meaning of the term. 8. The word “maintenance” is derived from Arabic word “Nafaq” which means “to spend” and in literal sense, the word “nafaqah” means what a person spends on his family. The word “maintenance” has been defined in Black’s Law Dictionary¹ as under:

“Financial support given by one person to another.”

5. It has been defined in Section 369 of the Principles of Muhammadan Law by D.F Mulla in following words: “369. Maintenance defined.

“Maintenance” in this Chapter includes food, raiment and lodging.”

6. Such definition of maintenance is not exhaustive. The word “includes” is generally used in interpretation clauses in order to enlarge the meaning of words or phrases, occurring in the body of the Statute; and when it is so used those words or phrases must be

¹ Blacks Law Dictionary 9th Edition 2009

construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include.

7. In this view of the matter, it does not exclude other necessary expenses for mental and physical well-being of a minor. This view is also fortified by the judgment in *Arslan Humayun* and another² wherein it was held that Section 369 *ibid* has a wider connotation and should be given an extended meaning, for the purposes of social, physical, mental growth, upbringing and wellbeing of the minor.

8. Undeniably, the Almighty Allah is the only sustainer, but, He has created means through which this task is accomplished. Bearing the expenses of children is the second most important task of the father³.

9. In Islamic law “maintenance” is termed as *Nafaqah* and signifies all those things which are necessary to support life. It is the legal and religious duty of a man to maintain his wife and children. The obligation to maintain wife and children is derived from the Holy Quran and is one of the incidences of marriage. Verse 233 of Surah Al-Baqarah says:

“...and it is incumbent upon him who has begotten the child to provide in a fair manner for their sustenance and clothing⁴.”

10. Furthermore, Verse 34 of Surah An-Nisaa enjoins:

² *PLD 2013 SC 557*

³ *Nasr, Sayyad Hossein, Islamic Spirituality Foundations, Crossroad, New York, 1987. page 147.*

⁴ *Holy Qur'an, 2:233*

“Men are the protectors and maintainers of women because God has given the one more (strength) than the other and because they support them from their means.”

11. Thus, right of child to be maintained by the father is ordained by Islamic law as mentioned above.
12. Similarly, under Pakistani law, the maintenance of a child is an obligation primarily upon the father. The Family Courts Act 1964 and the Muslim Family Laws Ordinance 1961 (“MFLO”) deal with the issue of maintenance of minors in Pakistan.
13. All the civilized nations of the world have recognised that children have rights by virtue of being children. These obligations are also *erga omnes*⁵ and have since been codified in the United Nations Convention on the Rights of the Child, 1989 (the “UNCRC”). UNCRC is an international treaty which sets out the rights of children. The State of Pakistan ratified the UNCRC on 12.11.1990 with its only reservation that its Articles will be interpreted in light of Islamic injunctions. However, in 1997, this reservation was withdrawn, thus, ratification became absolute.
14. Article 27 of the UNCRC is reproduced below for ease of reference;
 1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within

⁵*Erga omnes means those obligations that are owed to international community as a whole.*

their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

15. Said Article must be read with Article 3 paragraph 1 of the UNCRC, which reads as under

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child** shall be a primary consideration.”

16. The concept of the “child's best interests” is not new. Indeed, it pre-dates the Convention and was already enshrined in the 1959 Declaration of the Rights of the Child⁶, the Convention on the Elimination of All Forms of Discrimination against Women, 1979⁷, as well as in regional instruments and many national and international laws⁸.

⁶ Declaration of Rights of Child, 1959, para.2

⁷ Article 5(b) and 16(1)(d).

⁸ 8 UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, para.2

17. When assessing and determining the best interests of a child the obligation of the State to ensure the child such protection and care as is necessary for his or her well-being⁹ should be taken into consideration. Children's well-being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety¹⁰.
18. It is in the best interests of the child to have access to quality education, including early childhood education. All decisions on measures and actions concerning a specific child must respect the best interests of the child or children, with regard to education¹¹.
19. Apart from above, it is settled law that the ambit of a writ petition is not that of a forum of appeal, nor does it automatically become such a forum in instances where no further appeal is provided¹², and is restricted inter alia to appreciate whether any manifest illegality is apparent from the order impugned. It is trite law¹³ that where the fora of subordinate jurisdiction had exercised its discretion in one way and that discretion had been judicially exercised on sound principles the supervisory forum would not interfere with that discretion, unless same was contrary to law or usage having the

⁹ UN Convention on Rights of Children, 1969, Article 3 para 2

¹⁰ UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, para 71.

¹¹ Ibid., para 79.

¹² Per Ijaz ul Ahsan J in Gul Taiz Khan Marwat vs. Registrar Peshawar High Court reported as PLD 2021 Supreme Court 391.

¹³ Per Faqir Muhammad Khokhar J. in Naheed Nusrat Hashmi vs. Secretary Education (Elementary) Punjab reported as PLD 2006 Supreme Court 1124; Naseer Ahmed Siddiqui vs. Aftab Alam reported as PLD 2013 Supreme Court 323

force of law. The impugned judgments appear to be well-reasoned and no manifest infirmity is discernable therein or that they could not have been rested upon the rationale relied upon.

20. The Supreme Court has recently had occasion to revisit the issue of family matters being escalated in writ petitions, post exhaustion of the entire statutory remedial hierarchy, in *Hamad Hasan*¹⁴ and has deprecated such a tendency in no uncertain words. It has inter alia been illumined that in such matters the High Court does not ordinarily appraise, re-examine evidence or disturb findings of fact; cannot permit constitutional jurisdiction to be substituted for appellate / revisionary jurisdiction; ought not to lightly interfere with the conclusiveness ascribed to the final stage of proceedings in the statutory hierarchy as the same could be construed as defeating manifest legislative intent; and the Court may remain concerned primarily with any jurisdictional defect. Similar views were earlier expounded in *Arif Fareed*¹⁵.
21. In view of the rationale and deliberation delineated above, the petition at hand is dismissed alongwith pending applications.

Karachi
Dated: 13.02.2024.

JUDGE

Aadil Arab.

¹⁴ Per Ayesha A. Malik J in *M. Hamad Hassan v. Mst. Isma Bukhari & Others* reported as 2023 SCMR 1434.

¹⁵ Per Amin ud Din Ahmed J in *Arif Fareed vs. Bibi Sara & Others* reported as 2023 SCMR 413.