

IN THE HIGH COURT OF SINDH CIRCUIT COURT
HYDERABAD

Constitutional Petition No.S-900 of 2019

Petitioner : Mst. Bushra Saeed and another, through Mr. Irfan Ahmed Qureshi, Advocate.
Respondent : Ali Raza (Nemo).
Date of Hearing : 12.09.2025
Date of Decision : 04-12-2025

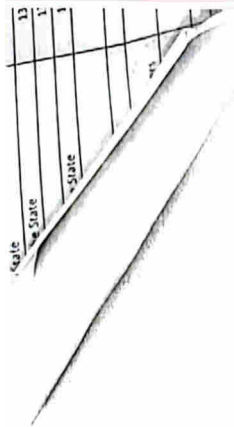
JUDGMENT

TASNEEM SULTANA, J: Through the instant Constitutional Petition, the petitioner has assailed the modified judgment dated 09.10.2024 penned down by the learned Model Civil Appellate Court/6th Additional District Judge, Hyderabad (Appellate Court), whereby the maintenance earlier awarded to her by the learned 4th Civil/Family Judge, Hyderabad (Trial Court) was withdrawn while the remaining components of the decree were maintained. The petitioner has approached this Court seeking the following reliefs:

- a. *To set aside the modified impugned judgment, whereby maintenance of the petitioner was withdrawn; to declare such finding as illegal, unlawful, void and ab initio null and void.*
- b. *To restore the entire judgment of the Trial Court passed by the 4th Civil/Family Judge as per the original decree.*
- c. *Any other relief deemed fit and proper in favour of the petitioners.*

2. The facts material to the present controversy reflect that the marriage between the parties was solemnized on 30-04-2014 with deferred dower fixed as 5 tolas of gold. After a short matrimonial stay at Karachi the petitioner alleges the respondent neither maintained her nor the minor daughter born from the wedlock. She asserts the respondent left her at her parents' house at Hyderabad and thereafter made no effort to take her back or provide maintenance. She alleges the dowry articles taken at the time of rukhsati remained in the custody of the respondent and neither the gold nor the cash component of dower was ever paid. She states she later learnt the respondent contracted a second marriage. On these assertions she instituted Family Suit No.1177 of 2015 for maintenance and recovery





of dowry articles and subsequently Family Suit No.1395 of 2016 for recovery of dower.

3. The learned Trial Court decreed the family suits vide consolidated judgment dated 12.11.2018 in the following manner: -

that the plaintiff (present petitioner) was entitled to her own maintenance at the rate of Rs.5,000/- per month from the date of filing of the suit till completion of her iddat period. The minor daughter was held entitled to past and future maintenance at the rate of Rs.6,000/- per month with 10% annual increase, subject to adjustment of any interim maintenance already paid. The defendant was directed to deposit future maintenance of the minor with the Nazir of the Court by the 10th of each English calendar month. The plaintiff was further held entitled to recovery of her dowry articles as per list, except gold ornaments, and also to recovery of her dower amount/Haq Mahr equivalent to 5 tolas of gold (Rs.250,000/-). Consequently, both consolidated suits were decreed, with parties left to bear their own costs.

4. The respondent being aggrieved from the said order, filed family appeal before the Court of District Judge District Judge Hyderabad wherefrom the same was made over to the court of lnd Additional Sessions Judge, Hyderabad ,and after hearing the Appellate court set aside the judgment and decree to the extent of maintenance of petitioner ,while the maintenance allowance of minor ,recovery of dowry articles and dower amount maintained with no order as to costs. The petitioner, therefore, being aggrieved with the conflicting findings of appellate court has come up with this writ petition.

5. Learned counsel for the petitioner, while addressing the merits, submitted the impugned judgment is based on misreading and non-reading of the evidence which had been correctly appreciated by the Trial Court. He argued the petitioner remained consistent in asserting the respondent left her at her parents' house at Hyderabad without maintaining her and this account stood corroborated by PW-2 and PW-3. He submitted the respondent failed to produce any documentary proof of payment of maintenance, delivery of dower or return of dowry articles, nor could he justify the contradictions appearing in his own deposition. He further contended the petitioner acquired ordinary residence at Hyderabad as she was compelled to reside there due to neglect, attracting the principle laid down in *PLD*



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2016 SC 613 *supra*. He argued the Appellate Court overlooked settled law that a wife forced to reside with her parents due to non-maintenance remains entitled to maintenance and prayed for restoration of the Trial Court's decree.

6. The respondent did not appear before this Court despite repeated notices and was ultimately served through publication. Even thereafter, no one entered appearance on his behalf. The matter is, therefore, being heard and decided in his absence.

7. Before going into the merits of the case, this court deems it necessary to examine the scope of writ jurisdiction under Article 199 of the Constitution, invoked against the appellate decisions especially in family matters. The Hon'ble Apex Court in Muhammad Hussain Munir Vs Sikandar (PLD 1974 SC 139), has held that High Court in such cases is only concerned with whether or not the courts below acted within its jurisdiction or not if such a court has the jurisdiction to decide a matter, it is considered competent to make a decision, regardless of whether the decision is right or wrong and even if the said decision is considered to be incorrect, it would not automatically render it as being without lawful authority so as to invoke High Court's constitutional jurisdiction. The relevant portion of the above-mentioned titled case is reproduced as under:

"An expression of art and refers to jurisdictional defects as distinguished from a mere erroneous decision whether on question, of fact or even of law - High Court, in exercise of its writ jurisdiction, concerned only with question whether Court or Tribunal below had acted within its jurisdiction - Tribunal having jurisdiction to decide a matter is competent to decide it rightly or wrongly and mere fact that decision is incorrect does not render the decision as "without lawful authority"-High Court, in writ jurisdiction, not competent to interfere with order of Tribunal on purely equitable considerations."

8. The Hon'ble Apex Court deviated from its view in the case of Utility Stores Corporation of Pakistan Limited Vs Punjab Labour Appellate Tribunal (PLD 1987 SC 447) wherein it was held that where the lower fora makes an error of law in deciding a matter, it becomes a jurisdictional issue since the same is only vested with the jurisdiction to decide a particular matter rightly, therefore, such decision can be quashed under constitutional jurisdiction as being in



excess of law as in terms of Article 4 of the Constitution, and thus, becomes a case proper for interference by a High Court in exercise of its constitutional jurisdiction. This powers of High Court under Article 199 stating that while, ordinarily, the High Court, does not re-examine evidence or disturb findings of fact, it can interfere if the findings are based on non-reading or misreading of evidence, erroneous assumptions, misapplication of law, excess or abuse of jurisdiction, and arbitrary exercise of powers, especially when the district court is the final appellate court which has reversed the findings of the trial court on unsupported grounds. Subsequently, the apex Court revisited this issue in Shajar Islam v. Muhammad Siddique (PLD 2007 SC 45) and clarified that the High Court should not interfere in findings on controversial questions of facts based on evidence, even if those findings were erroneous. It was further held that the scope of judicial review under Article 199 of the Constitution in such cases was limited to instances of misreading or non reading of evidence or when the finding was based on no evidence, leading to miscarriage of justice and that the high court should not disturb findings of fact through a reappraisal of evidence in its constitutional jurisdiction or use this jurisdiction as a substitute for a revision or appeal and that an interference with the lower courts' findings of fact was beyond the scope of the high court's jurisdiction under Article 199 of the Constitution. The apex Court in its recent judgment further elaborated on this view, in Mst. Tayyeba Ambareen and another Vs Shafqat Ali Kiyani and another (2023 SCMR 246), wherein it was held as under:

"8. The object of exercising jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") is to foster justice, preserve rights and to right the wrong. The appraisal of evidence is primarily the function of the Trial Court and, in this case, the Family Court which has been vested with exclusive jurisdiction. In constitutional jurisdiction when the findings are based on mis-reading or non-reading of evidence, and in case the order of the lower fora is found to be arbitrary, perverse, or in violation of law or evidence, the High Court can exercise its jurisdiction as a corrective measure. If the error is so glaring and patent that it may not be acceptable, then in such an eventuality the High Court can interfere when the finding is based on insufficient evidence, mis reading of evidence, non-consideration of material evidence, erroneous assumption of fact, patent errors of law,



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reevaluating the facts or substituting the appellate court's opinion with their own - the acceptance of finality of the appellate court's findings is essential for achieving closure in legal proceedings conclusively resolving disputes, preventing unnecessary litigation, and upholding the legislature's intent to provide a definitive resolution through existing appeal mechanisms."

10. Keeping in view the circumscribed scope of writ jurisdiction under Article 199, this Court has refrained from undertaking a reassessment of the entire evidence and has confined itself to examining whether the learned Appellate Court, while reversing the Trial Court's findings, committed any jurisdictional error, misapplied settled principles of law, or arrived at conclusions tainted by misreading or non-reading of material portions of the record. The limited inquiry before this Court is whether the impugned judgment reflects perversity or arbitrariness sufficient to justify constitutional interference. It is only to this extent that the evidence and reasoning of both Courts below have been scrutinized. The learned Appellate Court, upon appraisal of the record and proceedings, proceeded to overturn the conclusions of the Trial Court and observed as under:

".....As far as the question of maintenance of the respondent/plaintiff herself is concerned, under Muhammadan Law there is no obligatory duty cast upon the husband to maintain the wife when she refuses to live with him. The right of the wife to obtain maintenance from the husband is subject to her living with him and if she refuses to live with him without reasonable cause, then she is not entitled to maintenance. In the above settled principle of law, if the evidence of respondent/plaintiff is seen, she in para No.5 of the plaint, has stated that "...thereafter the defendant drop the plaintiff at her parent's home in the sense that he is trying to proceed abroad for his job, for which he has to move off and on to Islamabad for pursuance, so till that time the plaintiff should reside with her parents. Whereas neither he went at Islamabad for trying abroad, nor he succeeded to get employment inside the country, since about one and a half year due to lack of (un) experience of relevant filed as per his qualification" In para No.10 of the plaint the respondent/plaintiff has stated that "due to vacate the possession of rental flat by the landlord at Chapal luxury apartment the defendant had shifted his residence at his own flat at Noman Grand City Karachi, but, the plaintiff have dropped with newly born baby at her parent's home due to one or the other excuse." In Para No.11, the plaintiff has stated that "since April-2015, the



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plaintiff being resided with the minor at her parent's home, while all the maintenance of minor kid/baby and plaintiff of about Rs.20,000/- per month is being incurred by the parents of the plaintiff." In the examination in chief the respondent/plaintiff has deposed that "after 08 months of marriage defendant kept me on false hopes that he is moving Islamabad for new job purpose, therefore, he brought me at my parent's house at Hyderabad and assured me that he will take me back within few months. Meanwhile, the defendant vacated the rented premises and shifted to his/parent's house at Noman grand City without my knowledge. At the time defendant left me at Hyderabad I was pregnant of 08months. However, later-on, during pregnancy of 09 months, defendant once again brought me at Karachi and we reside together few days but once again due to my pregnancy days he brought me at my parent's house at Hyderabad. Later-on I gave birth to my minor baby at Liaquat National Hospital at Karachi and all the delivery expenses were paid by the defendant and his parent's. After the discharge from Hospital the defendant brought me and minor at my parent's house at Hyderabad due to unavailability of any female with defendant family for my and minor care. Since then, I am looking after the minor and provide her all the necessities of life but the defendant neither came to visit me or to see his minor baby nor he sent any single penny towards our maintenance." During the cross-examination the plaintiff has denied that she was not ousted by the defendant from his house.

The witness of the respondent/plaintiff in his examination in chief has stated that "One day all of sudden the plaintiff came to our house. I enquired from my sister who disclosed to me that plaintiff has come to visit us while the defendant has gone to Islamabad for job purpose. Later-on suddenly the plaintiff returned back to Karachi. After one month I came to know about the delivery of plaintiff at Liaquat National Hospital at Karachi and soon after 4 days of her delivery the plaintiff along with minor came to Hyderabad and started residing with us, I came to know from my sister that defendants documents for abroad are under process therefore plaintiff shall stay with us for few days but despite the lapse of many days neither the defendant nor any of his family member came to visit plaintiff or minor at Hyderabad, even not a single penny was sent as maintenance of plaintiff or minor.

The third witness of the plaintiff namely Saeed Ahmed the father of the plaintiff has deposed that "Since the birth of minor till today the plaintiff and minor are residing with me at my house and all their expenses are paid by me. After the delivery the defendant brought the plaintiff and her minor baby at my house



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for the purpose of their look after as there was not any female in the house of defendant. After that the defendant came only for once and took away plaintiff and minor with him but on second day again left the plaintiff and minor at my house and went away." In rebuttal, appellant/defendant in his written statement has denied that he had dropped the respondent/plaintiff at the house of her parent's. During the lengthy cross-examination nothing brought on the record from the mouth of appellant/ defendant that he did not take efforts to bring back the plaintiff and minor baby to his house. During the cross- examination he deposed that he has number of times visited in laws in order to reconcile the matter with the respondent/ plaintiff but no avail, rather the parents of respondent/ plaintiff always insulted him.

Learned Appellate Court further discussed as under:-

From the above evidence of the parties, it transpires that after the birth of baby the respondent/plaintiff was left at the house of her parents by the appellant/defendant because no female was available in his house to look after the respondent/plaintiff and thereafter he tried to bring back the respondent/plaintiff and her minor baby to his house but the respondent/plaintiff refused to join him without any justifiable cause. The record further reveals that the appellant/defendant much prior to the filing of present suit by the respondent/plaintiff had filed the suit for restitution of conjugal rights against the present respondent/ plaintiff before the Court of learned Family Judge-XX Karachi East bearing Family Suit No.625 of 2016, in which the respondent/ plaintiff failed to appear before the court and the suit was decreed against her as *exparte vide* Judgment and Decree dated 08-08-2016. It shows that after coming to know about the passing of decree for restitution of conjugal rights, the respondent/plaintiff instead of joining the appellant/defendant and performing her marital obligations filed the present suit, as such, it cannot be said that the appellant/defendant has ousted her or deserted her to live separately but she with her own free will and accordance was living separately from the appellant/ defendant. It shows that no reliable evidence is brought on record to establish the default on the part of husband but on the contrary it has been established that the respondent/ plaintiff despite hectic efforts and even filing the suit by the husband for restitution of conjugal rights preferred to live with her



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with minor residing at her parents house and being maintained but the defendant never ever returned back.

In order to prove her version, the plaintiff examined herself at Ex. 36 and reiterated the contents of plaintiff. Both the witnesses produced by the plaintiff during their examination also fully supported her version in this regard. The plaintiff and her witnesses were subjected to lengthy cross examination but remained consistent on this point. On the other hand the defendant in para no. 06 & 07 of the written statement alleged that he always properly maintained plaintiffs and kept them happy but the plaintiff on the instance of her well-wishers started quarrels with the defendant and pressurized him to live with her mother for which he was not ready because he already kept the plaintiff in separate accommodation near the house of her mother (parents) at Chapell luxury apartment Karachi though he had his own apartment/flat in Noman City Gulistan Johar Karachi, where the plaintiff was not ready to live. The defendant tried to understand the plaintiff that both are residing independently/ happily without interference of any one and his mother has already been passed away but the plaintiff annoyed, and she left the house of defendant along with minor and started residing at her parents' house. However, when the defendant stepped in to witness box before this court he changed his version of w.s and during his examination in chief at Ex. 40, testified that: -

"In the year 2015 I asked the plaintiff for shifting from rented flat to my parents' house, but the plaintiff did not oblige me and flatly refused to reside with my parents in joint family, due to, which some differences arose between us. In February 2015 plaintiff left my house and started residing at her parents' house without any reason."

Such contradiction virtue his pleadings and statement on the part of defendant created a doubt in veracity of truth attached to his deposition. Neither in the pleadings nor during his examination the defendant has leveled any allegation regarding the character against the plaintiff nor has he disclosed any incident showing the plaintiff is disobedient and prima facie it has been proved that the defendant himself created circumstances for the plaintiff to reside at her parents' house, when she refused to vacate the separate accommodation and to shift to his parents' house at Noman City and live with her father in law. However, during his cross examination the defendant admitted that since the stay of plaintiff at her parent's house, he never



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ever paid any single penny towards her maintenance. The wife has the right to live in separate accommodation with her husband and children, and not to share it with anyone, whether it is a father, a mother or a relative".

In the light of above discussion, the separate accommodation is the wife's right, even if she did not stipulate in the marriage contract, and she has the right to ask for it now and she is not regarded as being willfully defiant because of that. The commonly held view among some people that this is creating division among siblings, is not true, because this is a Shari' right of the wife, and it serves the interests of both spouses, because it prevents three mixing and guards them against looking at things that are not permissible."

The learned Trial Court further observed that: -

"In my humble opinion in the present case the defendant has failed to discharge his burden as to why the plaintiff is not entitled to maintenance. Forcing the plaintiff out of his house 'in midstream and lack of proper maintenance and self-respect for plaintiff lady are issues that are likely to give rise to fresh troubles and disputes. The ground that the Plaintiff is residing away and the filing of separate suit of conjugal right by the defendant and obtaining exparte decree at Karachi, during the pendency of two suits of plaintiff before this court itself cannot be made grounds for refusal of maintenance to the plaintiff. In such circumstances, the plaintiff cannot be deprived of her maintenance; therefore, she is entitled to recover her maintenance from the defendant at the rate of Rs.5000/- per month" since the day/date of approaching this court and filing of this suit for her maintenance till the completion of her iddat period."

12. A careful examination of the impugned reasoning of the learned Appellate Court shows that the factual material reproduced therein was not appreciated in its true context. The learned Appellate Court extracted paras 5, 10 and 11 of the plaint, as well as detailed portions of the petitioner's examination-in-chief, all of which demonstrate that the respondent repeatedly brought the petitioner to her parents' home at Hyderabad, initially on the pretext of pursuing foreign employment, later due to shifting from rented accommodation, and thereafter due to absence of any female member



