

**2011 C L C 820**

**[Lahore]**

**Before Nasir Saeed Sheikh, J**

**SHAHZAD HUSSAIN----Petitioner**

**Versus**

**JUDGE FAMILY COURT, LAHORE and 2 others-Respondents**

Writ Petition No.8948 of 2010, decided on 24th December, 2010.

**(a) West Pakistan Family Courts Act (XXXV of 1964)---**

---S. 5, Sched., Ss.17A & 17B---Constitution of Pakistan, Art.199---Constitutional petition---Interpretation of Ss.17A & 17B of the West Pakistan Family Courts Act, 1964---Suit for recovery of maintenance of minor daughter---Trial Court passed the order awarding interim maintenance---Review application filed by defendant was dismissed by Trial Court and struck off defendant's right of defence and decreed the suit---Appellate Court dismissed appeal of defendant---Validity---Section 17A of the West Pakistan Family Courts Act, 1964 empowered the Family Court to strike off the defence of defendant and pass a final decree if he failed to comply with the order of interim maintenance---Power to strike off the defence and decree the suit formed part of discretionary power of the court---Principles---Family Court did not exercise the power to pass the decree judiciously and decreed the suit in mechanical manner---Judgment and decree passed by the Family Court were set aside---Constitutional petition was allowed.

**(b) West Pakistan Family Courts Act (XXXV of 1964)---**

---S. 17A---Scope, nature and application of S.17A of West Pakistan Family Courts Act, 1964---Power of court to strike off defence of defendant---Scope---Use of the term 'may' in S.17A of the West Pakistan Family Courts Act, 1964 suggested/reflected that the discretion had to be exercised judicially while striking off the defence of the defendant---Where defendant could explain the reason for not complying with the interim order of maintenance, Family Court was authorized to exercise discretionary power, that is why, the word 'shall' ,had not been used by the legislature---Where wilful default in complying with interim maintenance order by defendant was established, the court could pass an order of interim maintenance and pass a final decree against such defendant---Process of passing a final decree under S.17A of the West Pakistan Family Courts Act, 1964 could not be accomplished by a Family Court through passing a mechanical final decree---Adoption of mechanical process was contrary to the provisions of S.17A of the West Pakistan Family Courts Act, 1964 rendering the provision of S.17B of the Act redundant by negating the intention of the legislature.

**(c) West Pakistan Family Courts Act (XXXV of 1964)---**

---S. 17B---Scope and application of S.17B, West Pakistan Family Courts Act, 1964---  
Section 17B empowered the Family Court to issue commission, examine any person, make a local investigation and to inspect any property or document---Section 17B of the West Pakistan Family Courts Act, 1964 was to enable the court to hold inquiry into financial resources of the father, needs of the spouse or minor for determining the rate of maintenance where the court had to exercise its discretion judicially in order to pass a final decree granting maintenance---Section 17B facilitated the process of determining the rate of maintenance by the Family Court while exercising its discretion.

**(d) Civil Procedure Code (V of 1908)---**

---S. 2(2)---Decree---Meaning---Decree was a judicial act which involved adjudication---  
Process of passing a decree involved pronouncement of final judgment in the matter by the court---Word 'decree' meant an order by one in authority; a judicial decision; an edict in law.

**(e) Words and phrases---**

---"Adjudication"---Definition---Adjudication refers to judicial determination of a matter in controversy.

Arif Sana Bajwa v. Additional District Judge (Mushtaq Ahmad Tarar), Lahore and others 2004 MLD 794; Ch. Zafar Ullah Khan and 6 others v. Pakistan through Secretary, Ministry of Defence Government of Pakistan, Islamabad and 5 others and Ghulam Muhammad v. Barkat Ali and 4 others PLD 1975 SC 15; Hyderabad Development Authority through M.D., Civic Centre, Hyderabad v. Abdul Majeed and others PLD 2002 SC 84; Messrs Union Bank Limited v. Messrs Silver Oil Mills Limited and others 2003 SCMR 116; Messrs Faridsons Ltd. Karachi, and 2. Messrs Friederike Ltd. Karachi v. Government of Pakistan through its Secretary, Ministry of Commerce Karachi PLD 1961 SC 537; Bahadur Khan v. Muhammad Yousaf 1992 SCMR 2117 and Chairman Regional Transport Authority Rawalpindi v. Pakistan Mutual Insurance Company Limited Rawalpindi PLD 1991 SC 14 fol.

Pakistan Lawyers Forum (Registered) through its President v. Federation of Pakistan through Secretary Ministry of Law and Justice, Human Rights, Islamabad and 2 others PLD 2005 Lah. 107; Nasrullah and another v. Haji Usman Ghani 2002 CLC 1925 and Amarsangji Dunganji Jhala v. Deepsangji Ravabhai Jhala AIR 1925 Bombay 241 rel.

Ghulam Ali Raza for Petitioner.

Shakil Ahmad for Respondent No.2.

**ORDER**

**NASIR SAEED SHEIKH, J.---** The instant writ petition has been instituted by Shahzad Hussain to assail the judgment and decree dated 26-10-2009 passed by the learned Judge Family Court, Lahore and the judgment dated 25-3-2010 passed by the learned Additional District Judge, Lahore in a matter involving grant of maintenance allowance to the minor daughter of the petitioner @ Rs.20,000 per month.

2. Briefly stating the facts of the case are that the petitioner and Mst. Mahrukh were married with each other on 19-4-2008 at Lahore. During the wedlock a daughter Arooba Fatima was born on 4-4-2009 when the relations between the spouses had already turned hostile with each other. A suit was instituted on 13-4-2009 by the minor daughter Arooba Fatima through her mother Mahrukh before Judge Family Court Lahore for the recovery of maintenance allowance @ Rs.20,000 per month against the petitioners It was contended in the plaint that the petitioner is a very rich man who was got an established business in UK as well as in Spain and therefore he can easily afford to pay Rs.20,000 per month as maintenance allowance to his daughter-plaintiff.

3. This suit was contested by the petitioner by submitting a written statement. The contentions raised in the plaint about the financial position of the petitioner were denied. The learned Judge Family Court Lahore vide order dated 8-6-2009 passed an order for the grant of interim maintenance @ Rs.10,000 per month in favour of the minor-plaintiff since the date of her birth. The learned Judge Family Court then kept adjourning the case with the directions to the petitioner to make the payment of interim maintenance and on 30-9-2009 framed the following issues:---

### **Issues**

(1) Whether the plaintiff is entitled to recover maintenance allowance from the defendant, if so, its detail? OPP

(2) Relief.

4. The petitioner assailed the order dated 8-6-2009 by filing Constitutional Petition No.14248 of 2009 which came up for hearing before a learned Single Judge of this Court on 13-7-2009 and it was held that the constitutional petition is not maintainable against an interim order. However the petitioner if so advised may file an application before the same learned Judge Family Court for the redress of his grievance. The petitioner then moved an application for the review of the order dated 8-6-2009 before the Judge Family Court, Lahore which application was dismissed vide order dated 26-10-2009. The learned Judge Family Court further through the order dated 26-10-2009 struck off the defence of the petitioner and decreed the suit as prayed for along with 10% annual increase in favour of the minor daughter. The operative part of the order dated 26-10-2009 is reproduced below : ---

"Learned counsel for the defendant has been asked to pay interim maintenance allowance but he has refused, subsequently defence of the defendant is struck off and suit is decreed as per prayer along with 10% annual increase for the minor. Decree sheet be drawn up. File be consigned to the record room after its due completion."

5. The petitioner preferred an appeal against the judgment and decree dated 26-10-2009 passed by the learned Judge Family Court which appeal, came up for hearing before the learned Additional District Judge and was dismissed vide judgment and decree dated 25-3-2010. The paragraph No.7 of the judgment and decree dated 25-3-2010 is reproduced as follows:--

"For said situation the law is clear on the subject. Newly added section 17-A of the Family Courts Act, 1964 contains a mandatory provision that if interim maintenance of the minor is not paid, the court may strike off the defence of the defendant and decree the suit. When the appellant did not pay maintenance allowance to the minor/ respondent despite availing a number of opportunities and even failed to pay maintenance under protest, the learned trial court rightly struck off his defence and decreed the suit of the respondents according to prayer of the suit. There is no illegality in the impugned order, therefore the same is up held. The appeal is dismissed. Parties are left to bear their own cost. Record of the learned trial court may be sent back immediately while file of this court be consigned to the record room after its due completion."

6. The petitioner then instituted the instant writ petition against the decisions announced by the two courts below. The writ petition came up for preliminary hearing on 6-5-2010 and a learned Single Judge of this Court issued notice to the respondent No.2, the minor daughter through her next friend and mother Mahrukh subject to deposit of the decretal amount. The petitioner was also directed to deposit future maintenance for the minor as decreed without fail.

7. It is pointed out by the parties that the decretal amount @ Rs.20,000 per month has already been deposited by the petitioner ever since the date of institution of the suit which has also been withdrawn by the respondent No.2. The learned counsel for the petitioner has also informed that the current/ future maintenance allowance is being deposited in accordance with the judgments and decrees passed by the two courts below after the institution of the writ petition as well. This writ petition was fixed for hearing on 23-12-2010 on which date the learned counsel for the writ petitioner made the following statement:-

"The learned counsel for the petitioner submits that he would not press this writ petition and would have no objection to the passing of the decree for the grant of maintenance to the minor daughter at the rate of Rs.10,000 per month with all arrears and will also continue to pay the maintenance at the same rate to the minor daughter."

8. The learned counsel for the respondent No.2 sought time to prepare his brief and case was fixed for today for arguments of the learned counsel for the respondent No.2.

9. Arguments have been addressed. The learned counsel for the writ petitioner in view of the statement recorded above did not further argue the case.

10. The learned counsel for the respondent No.2 contended that the provisions of section 17A of Punjab Family Courts Act, 1964 specifically provide that Family Court has been invested with the powers to pass an interim order for grant of maintenance in a pending suit instituted before it and in case the order so passed for interim maintenance is not complied with the defence of the

defendant of the suit is liable to be struck off and the decree is to be passed as prayed for. The learned counsel for the respondent No.2 has argued that the provisions of section 17A of Punjab Family Courts Act, 1964 is a mandatory provision and no change in the rate of maintenance allowance granted by the Judge Family Court is permissible and that suit has rightly been decreed as prayed for on account of the failure of the petitioner to pay the interim maintenance allowance. Thus the learned counsel for the respondent No.2 prayed for the dismissal of the writ petition and of upholding the judgments and decrees passed by the two courts below awarding the final decree of maintenance allowance @ Rs.20,000 per month as prayed for in the plaint.

11. I have considered the arguments of the learned counsel for the parties.

12. It is a matter of record that the proceedings in the instant suit instituted by the respondent No.2 for grant of her maintenance were not decided on the basis of merits of the case after recording of the evidence of the parties in any manner. The proceedings commenced with the institution of the suit by respondent No.2 and the petitioner submitted a written statement. During the pendency of the suit on 8-6-2009 an order was passed for directing payment of interim maintenance allowance for the minor daughter @ Rs.10,000 per month. The age of minor daughter is admittedly about 1-1/2 year as she was born on 4-4-2009 which fact is narrated in paragraph No.5 of the plaint by the respondent No.2. It is also matter of record that the present writ petitioner did not comply with the interim maintenance order passed by the Judge Family Court and ultimately vide order dated 26-10-2009 his right to defend the suit was struck off by the Judge Family Court and the suit was decreed as prayed for along with 10% annual increase for the minor.

13. Section 17A was added in the Punjab Family Courts Act, 1964 through an amending Ordinance No.IV of 2002 dated 1-10-2002 which reads as follows:-

[17A. 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."

It is important to note that through same amending Ordinance No.IV of 2002 another section 17B was also added to Punjab Family Courts Act, 1964 which also reads as follows:-

17B. Power of the Court to issue Commission.-- -Subject to such conditions and limitations as may be prescribed, the Court may issue a Commission to,--

- (a) examine any person;
- (b) make a local, investigation; and
- (c) inspect any property or document

14. In a family suit Judge Family court has been authorised and empowered specifically to make an arrangement for the grant of interim maintenance to the wife and children of a family, and

even prior to the incorporation of section 17A general powers of Family Court to award interim maintenance to cater for the needs for the wife and children of the family were judicially recognized. Reference may be made to judgment reported as Arif Sana Bajwa v. Additional District Judge (Mushtaq Ahmad Tarar), Lahore etc. (2004 MLD 794). However the newly added section 17A empowers the Judge Family Court that where order for granting of interim maintenance passed by the Judge Family Court is not complied with, the Court may strike off the defence of the defendant and also may pass a final decree. It is to-be observed that this provision for closing the defence of a defendant in the family suit has been particularized to form part of the discretionary sphere of the powers of the Judge Family Court as in both the eventualities i.e. one for striking off defence of the defendant and for decreeing the suit the term "may" has been used by the law framers. It is also again relevantly important to note that in the portion where the concept of decreeing the suit after striking off the defence of the defendant has been provided for the legislature has purposely omitted the term "as prayed for".

15. The Court also observes that through the same amending Ordinance another power has been conferred upon the Family Court by adding section 17B immediately after the newly added section 17A to issue Commission, to examine any person, to make a local investigation and to inspect any property or document. This newly added section 17B immediately after section 17A has direct nexus and connectivity with section 17A of the Punjab Family Courts Act, 1964. The purpose of adding section 17B appears to be that where the defence of a defendant in a family suit is being struck off for the failure of the defendant to comply with the interim order for grant of interim maintenance, the Judge Family Court has to exercise his discretion judicially for passing a final decree granting maintenance against such a defendant by holding some inquiry into the financial sources of the father and also into the needs of the spouse or the minor as the case may be, for determining the rate of maintenance allowance.

16. The passing of a decree by a Court of law is a judicial act and involves the process of adjudication. The term "decree" has not been defined in the provisions of Family Courts Act, 1964 and for the purpose of tracing the ordinary meaning of the term "decree" in the legal parlance we can have access to Black's Law Dictionary Eighth Edition at page 440 wherein the following concept of a decree has been pointed out:--

"decree. (1) Traditionally, a judicial decision in a court of equity, admiralty, divorce, or probate --- similar to a judgment of a court of law." < the judge's decree in favor of the will's beneficiary> (2) A court's final judgment. (3) Any court order, but esp. one in a matrimonial case <divorce decree> .

17. The concept of passing a decree is recognized in section 17A of Punjab Family Courts Act, 1964 which process involves an act by the Court of pronouncing a final judgment in the matter and the term final judgment has also been elaborated in the Black's Law Dictionary Eighth Edition at page 859 which reads as follows:--

"Final judgment.--- A court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment."

18. Again the superior Courts have defined the term "decree" to connote an order by one in authority, the judicial decision, an edict in law. Reference may be made to reported judgment Ch. Zafar Ullah Khan and 6 others v. Pakistan through Secretary, Ministry of Defence Government of Pakistan, Islamabad and 5 others v. Barkat Ali and 4 others PLD 1975 SC 15. The concept of adjudication has also been elaborated by the superior Courts by holding that it refers to judicial determination of a matter in controversy as distinguished from determination by a Court on the administrative side. Reference can be made to judgments reported as Hyderabad Development Authority through M.D., Civic Centre, Hyderabad v. Abdul Majeed and others PLD 2002 SC 84, Messrs Union Bank Limited v. Messrs Silver Oil Mills Limited and others 2003 SCMR 116, Pakistan Lawyers Forum (Registered) through its President v. Federation of Pakistan through Secretary Ministry of Law and Justice, Human Rights, Islamabad and 2 others PLD 2005 Lah. 107, Nasrullah and another v. Haji Usman Ghani 2002 CLC 1925 and 1 Messrs Faridsons Ltd. Karachi, and 2. Messrs Friederike Ltd. Karachi v. Government of Pakistan through its Secretary, Ministry of Commerce Karachi and 2 others. The Chief Controller of Imports and Exports, Government of Pakistan Karachi PLD 1961 SC 537. A final judgment also includes an ex parte judicial determination as well. Reliance is placed upon Bahadur Khan v. Muhammad Yousaf 1992 SCMR 2117. In an old Indian case it was laid down that when a Court of law does not undertake adjudication of a matter then it cannot be said to be a decree. Reference can be made to Amarsangji Dunganji Jhala v. Deepsangji Ravabhai Jhala AIR 1925 Bombay 241 (Full Bench).

19. A close analysis of the newly added section 17A leads the Court to come to the conclusion that the provisions of section 17A are undoubtedly penal provisions resulting into striking off of the defence of 11 the defendant for his failure to comply with the order passed by the Judge Family Court of awarding interim maintenance and then passing a decree against him. The use of the term "may" by Legislature in investing Family Court with this power of striking off the defence is itself embodiment of the recognition of the fact that this discretion has to be exercised judicially in striking off the defence of a defendant for non-compliance with the interim order. The concept of judicial discretion to be exercised by an authority has also been attended to by the honourable Supreme Court of Pakistan in a celebrated judgment Chairman Regional Transport Authority Rawalpindi v. Pakistan Mutual Insurance Company Limited Rawalpindi PLD 1991 SC 14 and the method of structuring of the discretion has been elaborated in the following words:

"Wherever wide-worded powers conferring discretion are found in a statute, there remains always the need and the desirability to structure the discretion. Structuring discretion means regularizing it, producing in it, so that decisions will achieve a higher quality of justice. The seven instruments that are most useful in the structure of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents, and fair informal procedure. When legislative bodies delegate discretionary power without meaningful standards administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles and rules. The movement from vague standards to definite standards to broad principles to rules may be accomplished by policy statements in any form, by adjudicatory opinions, or by exercise of the rule-making power. When legislative bodies delegate discretionary power without meaningful standards, administrator should develop standards at the earliest feasible time, and then,

as circumstances permit, should further confine their own discretion through principles and rules."

20. Now coming back to the provisions of section 17A of Punjab Family Courts Act, 1964 it is observed that there may be a situation where although an order for the grant of an interim maintenance has been passed by a Judge Family Court but if the defendant has some explanation for not complying with such an order, may be for his financial inability or some other difficulty to explain, it has been given recognition too by the legislature. Here the Judge Family Court has been authorised to exercise his discretionary powers keeping in view the facts and circumstances of the case before him and that is why the term "shall" has not been used by the legislature in case the defendant does not comply with the interim maintenance order passed by the Judge Family Court. If the process of examination of the facts and circumstances of the case compel the Court to draw an inference against a defendant that he has wilfully defaulted in complying with the interim maintenance order, then his defence may be struck off and later the second power made available to the Judge Family Court is the passing of final decree against such a defendant. In the last portion of section 17A which empowers a Judge Family Court to pass final decree against the defendant, the law framers have purposely omitted the use of the term "as prayed for in the plaint". Thus the Judge Family Court when passes an interim maintenance order in a family suit and comes to the conclusion that a defendant has wilfully defied the said interim maintenance order, then the final determination of certain facts before passing a decree by the said Judge Family Court has to be undertaken by him because the provisions of Qanun-e-Shahadat Order, 1984 and that of Code of Civil Procedure 1908 except sections 10 and 11 do not apply to the proceedings before Family Court. This eventuality highlights the legislative wisdom in, adding section 17B immediately after section 17A in the Family Courts Act, 1964 through the same amending Ordinance No.IV of 2002 empowering the Judge Family Court to hold an inquiry through an appointment of Commission etc. in order to finally decide the question of grant of maintenance to the wife and children in a family suit under section 17A of Punjab Family Courts Act, 1964 where the Judge Family Court has to exercise his judicial powers to strike off the defence of the defendant of said suit for the reasons stated in section 17A.

21. This Court cannot endorse an opinion that this process of passing of a final decree under section 17A by Judge Family Court can be completed through a mechanical or automatic process of granting a final decree as prayed for in the plaint in case the defendant does not comply with the interim maintenance granting order of the Judge Family Court. This adoption of the mechanical process is not only contrary to the provisions of section 17A but is also violative of the concept of adjudication and will also render the provisions of section 17B of Punjab Family Courts Act, 1964 which have been added just immediately after section 17A 'as redundant or nugatory which intention cannot be attributed to the legislature. The Judge Family Court has to undertake some exercise in arriving at a judicial and just conclusion with respect to the financial resources of the defendant, the needs of the plaintiff of the maintenance suit and the determination of the rate of maintenance to be finally decreed by the Judge Family Court. It is for facilitating this process that section 17B has been inserted and added to the Family Courts Act, 1964.

22. In the instant case the Judge Family Court did not exercise this power of passing the final decree against the petitioner in a judicial manner. He did not look into the facts as to what are the

financial resources of the petitioner, what are the needs of the minor daughter aged 1-1/2 year and how much maintenance is necessarily required to cater for providing a good healthy life to the minor daughter. The Judge Family Court thus mechanically decreed the suit as prayed for @ Rs.20,000 per month with 10% annual increase which process adopted by the Judge Family Court is therefore not sustainable in the eye of law and is set aside. The learned first appellate court of Additional District Judge also did not apply his mind to this aspect of the matter therefore the first appellate court judgment is also set aside. However as the learned counsel for the petitioner has voluntarily, agreed to the grant of maintenance allowance to the minor daughter respondent No.2 @ Rs.10,000 per month, which amount will sufficiently meet the needs of the minor aged 1-1/2 year, I do not consider it appropriate to remand the case to the Judge Family Court. The judgment and decree passed by the learned Judge Family Court is set aside and the final decree is awarded to the respondent No.2 for maintenance @ Rs.10,000 per month with an annual increase of 10%. The amount already paid/deposited by the petitioner shall remain with the respondent No.2 and if some amount remains in excess of the rate determined by this Court, the same shall be adjusted for future maintenance. After the above adjustment the petitioner shall continue to pay the maintenance allowance at the rate determined by this Court till some modification is made in future for more needs of the plaintiff/minor daughter.

23. The instant writ petition is accepted in the light of the above mentioned observations and directions. The parties to bear their own costs.

A.R.K. /S-31/L

Petition accepted.