

Judgment Sheet
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

WP No.154537 of 2018

Nazia Bibi etc.

Versus

Additional District Judge, Ferozewala etc.

J U D G M E N T

Date of Hearing	11.9.2018
Petitioners By:	Chaudhary Aurangzeb Gujjar, Advocate for Petitioners in WP No.154537/18 and for Respondents No.2 to 5 in WP No.194641/2018.
Respondents By:	Mr. Imran Muhammad Sarwar, Advocate for Respondent No.3 in WP No.154537/18 and for Petitioner in WP No.194641/2018.

Ayesha A. Malik J: This judgment decides upon the issues raised in WP Nos.154537/2018 and 194641/2018 as both the petitions raise common questions of law and facts arise out of the same impugned judgment dated 11.1.2018 passed by Respondent No.1, Additional District Judge, Ferozewala.

2. Facts of the case are that Petitioner No.1 filed a suit for recovery of maintenance allowance for herself as well as for three minors. The suit was decreed on 21.5.2014 such that each minor was given Rs.7000/- per month as maintenance along with 10% yearly increase. Subsequently, the Petitioner No.1 filed an application for enhancement of maintenance of the minors on 14.6.2016 which was rejected vide order dated 17.3.2017 for the reason that *it is not open to the applicant, decree holder now to contend that maintenance allowance has not been correctly assessed or determined. If it were permissible, there will be no end or finality to the judgment and decree dated 21.5.2014 which had become final.* The Petitioner No.1 then filed a second application seeking enhancement of maintenance

allowance from Rs.7000/- to Rs.300,000/- per child per month, which was dismissed vide order dated 26.7.2017 for the reason that *neither the petitioners assailed the judgment passed by learned trial court nor challenged their earlier filed petition dismissed by learned transferor court and now again despite availing efficacious, proper remedy filed the petition in hand which in no sense maintainable*. On 25.9.2017 the Petitioner No.1 filed an appeal before Respondent No.1 against order dated 26.7.2017 who vide judgment dated 11.1.2018 partially accepted the appeal and enhanced the monthly maintenance of the minors from Rs.7000/- to Rs.12,000/- per head per month plus 10% yearly increase. The Petitioners are aggrieved by the fixation of maintenance of Rs.12000/- per month per minor. Hence this petition.

3. The case of the Petitioners is that Respondent No.3 was capable of paying far more than Rs.12,000/- per month per child which is reflected from the documentary evidence produced with the application which included Respondent No.3's tax returns and property documents. It is their case that the court should have given proper consideration to the evidence while fixing maintenance.

4. Respondent No.3 who is the Petitioner in WP No.194641/2018 is aggrieved by the impugned judgment on account of the fact that the same has been passed in a time barred appeal, which as per the contention of the learned counsel, Respondent No.1 could not have condoned the delay. Learned counsel also argued that the conduct of the Petitioners by repeatedly filing enhancement applications shows that she did not have a genuine requirement of enhancement but only wants to harass Respondent No.3. With respect to the amount fixed by the court at Rs.12,000/- per child per month, learned counsel submitted that this amount is arbitrary, without due consideration of the relevant facts or record; that the court did not take into consideration the monthly income of Respondent No.3 nor did it take into consideration the fact that Respondent No.3 is married and has

six children, hence he is not able to pay Rs.12,000/- per month per child.

5. In terms of the impugned judgment dated 11.1.2018 passed by Respondent No.1 on the question of condonation for delay, the court accepted the contention of the Petitioner No.1 that she was not aware that the District and Session Court was open in August, hence she did not file the appeal. The court also found that since the real issue is with reference to the welfare of the minors and Respondent No.3 is responsible to provide for the upbringing of his children. The court condoned the delay and proceeded to hear the appeal against order dated 26.7.2017. In this regard, since the ultimate consideration is the welfare of the minors, there appears to be no reason to interfere with the discretion exercised by the court while condoning the delay as the same was done with due consideration of the facts and the law.

6. The real issue in this case is the manner in which maintenance allowance to be paid by the father is fixed by the court. The Petitioners prayed for enhancement of maintenance at the rate of Rs.300,000/- per month per child on account of the financial status of Respondent No.3. In the reply, Respondent No.3 explained that he was unable to pay the amount sought by the Petitioners as the demand is not justifiable. The Judge Family Court considered the application for enhancement of maintenance and dismissed the same on the ground that the suit was decreed on 21.5.2014 and it was never challenged by the Petitioners before any forum, hence the minors are not entitled to enhancement of maintenance. It is noted that this decision of the Judge Family Court is flawed and totally contrary to the law. It is settled law that an application for enhancement of minor's maintenance allowance may be filed subsequent to a judgment and decree. Reliance is placed the case cited at Muhammad Iqbal v. Mst. Nasreen Akhtar (2012 CLC 1407) wherein the Court held that:

On the issue whether a suit for enhancement of maintenance is maintainable under the Schedule, the answer is that the same is maintainable. The Schedule provides for the matter over which the family court should have jurisdiction. Maintenance is provided at serial No.3. As such there is no bar on filing a suit for enhancement of maintenance. There are bound to be changes in the circumstances and changes in the requirements of the children. Naturally, as the children will grow their needs will also grow. Reliance is placed on a case titled Arab Mir Muhammad Vs Mst. Iram Iltimas and 4 others (1999 CLC 1668). It is noted that this is an unrealistic approach that the maintenance allowance should remain fixed throughout the growing period of the minor or that the 5% increase should be considered sufficient. A father is legally bound to maintain the minor in terms of the requirement of the minor and the cost of living.

Hence the Petitioners could claim enhancement of the decreed maintenance allowance. Notwithstanding the same, the Appellate Court while considering the appeal of the Petitioners enhanced the maintenance from Rs.7000/- to Rs.12,000/- per month per child, with 10% annual increase. The reason given was the financial status of Respondent No.3 and the daily growing requirements of the minors. However there is no discussion on their enhanced requirements of the minors nor is there any discussion on the earning capacity of Respondent No.3. A bare reading of the order shows that the court assumed that Rs.12000/- per child was sufficient. There is no discussion on the ages of the minors, on the needs of the minors nor any finding on the enhanced claim for the minors.

7. As per settled law, maintenance with respect to the muslim children shall be governed by the injunctions of Islam and in other cases as per applicable personal law. The august Supreme Court of Pakistan has considered this issue in "Humayun Hassan v. Arslan Humayun and another" (PLD 2013 SC 557) and held as follows:

4. There can be no cavil with the proposition that the maintenance issue(s), in relation to Muslim relatives shall be governed and regulated by the principles/injunctions of

Islam i.e. as per the personal law of the parties. In this context, according to section 369 of the Muhammadan Law by D.F. Mullah, maintenance means and includes food, raiment and lodging. However, it may be observed that from the very language of the above section, such definition is neither conclusive nor exhaustive, and in our view it undoubtedly has a wider connotation and should be given an extended meaning, for the purposes of meeting and catering for the present days social, physical, mental growth, upbringing and well being of the minor, keeping in mind the status of the family, the norms of the society and his educational requirement, which has now attained utmost importance; but obviously corresponding to and commensurating with the means and the capacity of the father to pay. Anyhow, the same jurist in section 370 of the book has elucidated the liability of the father to pay the maintenance to his children as follows:-

“370. Maintenance of children and grandchildren.---(1)

A father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. But he is not bound to maintain his adult sons unless they are disabled by infirmity or disease. The fact that the children are in the custody of their mother during their infancy (section 352) does not relieve the father from the obligation of maintaining them. But the father is not bound to maintain a child who is capable of being maintained out of his or her own property.

(2) If the father is poor, and is capable of earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be.

(3) If the father is poor and infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances.”

Again in interpreting the word “maintenance” some reasonable standard must be adopted. Whilst it is not confined merely to food, clothing and lodging, it cannot, by any stretch of imagination, be extended to incorporate within it education at higher levels ad infinitum. What is necessary to decide in this connection is to find out as to what amount of education has to be attained by the child concerned, having regard to the status and other circumstances of his family, to enable it to earn a complete livelihood by honest and decent means. Thus it may not be sufficient to say that the child of a tradesman can maintain itself by working as coolly or by thieving. What is required is that the child must be maintained until it is in a position to earn its own

livelihood, in an honest and decent manner in keeping with its family status.

Hence a father is obligated to maintain his children and a reasonable standard must be assumed for determining quantum. It is seen that more often than not family courts and appellate courts while exercising jurisdiction in cases requiring determination of maintenance tend to fix the quantum of maintenance without discussing the factors considered or the reasons for concluding so. Hence one has to wonder on what basis did the court formulate its opinion whilst fixing maintenance. It goes without saying that a judicial order must be a speaking order where the reasons are clearly stated by the court. In this case the Appellate Court has not discussed the earning capacity of Respondent No.3 nor the requirements of the minors, yet enhanced the maintenance from Rs.7000/- to Rs.12000/- per month.

8. It goes without saying that the court while considering the quantum of maintenance will take into consideration the fundamentals being the minors education, status, general expenses as has been clearly set out in **PLD 2013 SC 557** (*supra*). The court must also take into consideration reasonable probability of obtaining education and the ability to take care of the minors in a stable, safe and healthy environment. Without due consideration of all these factors, the court cannot conclude positively the quantum of maintenance. There is no hard and fast formula for determining quantum of maintenance and the main consideration for the Court is the ability of the father to maintain the minors. A father is obligated under the law to take care of his minor children and the quantum has to be determined as per his earning, financial and social status and the ability that he may have to take care of the minors. This way merely stating that he is jobless will not discharge him of his obligation. The basic objective for determining maintenance is to ensure that in all probability the minors

are maintained by the father in dignified manner with reasonable comfort and that the mother of the child is not left to bear the burden of taking care of the minors.

9. Quantum of maintenance requires due consideration of all factors on the basis of which the court can determine the actual need of the minor. In this regard, it is important for the court to first determine the expenses incurred or likely to be incurred on the minors. For this purpose the court must look into the living conditions of the minor and the manner and means by which the mother is maintaining the minors which will include factors like where they reside, whether the mother is dependent upon her family, if so what is the income on the basis of which the minor is also being cared whether she has a job and whether she has any source of independent income. Special needs of the minor which will include medical or physical needs or special educational needs should also be seen. Special needs will vary from case to case, if relevant, as it is unique to the situation and individual. Yet for the purpose of maintenance it is the obligation of the father to fulfill these special needs. In the case of enhancement, the court must also determine as to what extent the maintenance already fixed meets the requirement and expenses of the minor and for what purpose, further enhancement is required. At the same time the court must determine the income of the father either through proper documentary evidence or on the basis of the social status and earning capacity of the father. In order to ensure that proper information is before the court, it may always require the father to produce documents such as his salary slips or any bank statement or property document on the basis of which he is able to show his monthly income or earning or his financial status. In this regard, the assets owned by the father are relevant as it contributes towards establishing the financial status of the father that has to be probed into by the court and based on attending circumstances the court can

conclusively establish the means through which the father will be able to maintain the minors. It is also important to take into consideration any liability of the father, that is whether he is paying any bank loan or debt, whether he has remarried or has other children or whether his parents are dependent on him. In this way the court can determine the manner in which the income of the father is spent and balance the income and capacity with the reasonable requirements of the minors seeking maintenance.

10. In this regard, it is noted that Section 17(A) of the West Pakistan Family Courts Act, 1964 specifically provides in sub-section 4 that for the purposes of fixing maintenance, the court may summon the relevant documentary evidence from any organization, body or authority to determine the estate and resources of the defendant. The purpose of this provision is to facilitate the court to determine the financial position of the father. The court therefore is not dependent on documents or information provided by the father and can call for relevant documents or information be it from the relevant department or organization or as the case requires, in order to determine the income of the father. In “Khadeeja Bibi and others v. Abdul Raheem and others” (2012 SCMR 671) the august Supreme Court of Pakistan held that even on the question of determining the annual increase in maintenance in the absence of any evidence on the point of annual increase the court should refrain from imposing such annual increase in the payment of maintenance to the minor, which is not in co-relation to the income of the father and the capacity of the father with respect to income. Therefore where the court is required to look into the future need of the minor that too must be done on the basis of reasonable and likely increase that can be made based on age, needs and on the maintenance that is being fixed for the present day.

11. The judgment under challenge has failed to make any determination on the requirement and need of the minors and also on

the income of the father. Under the circumstances, impugned judgment dated 11.1.2018 passed by Respondent No.1 has not considered the evidence properly nor has any determination been made on the income of the father. Under the circumstance, both the petitions are **accepted**, the impugned judgment dated 11.1.2018 to the extent of quantum of maintenance is set aside and the matter is remanded to the Appellate Court to consider all relevant facts and documents as prescribed in this judgment and make a proper determination with respect to fixation of the maintenance of the minors, after hearing both the parties and pass a speaking order in accordance with law.

(AYESHA A.MALIK)
JUDGE

Approved for reporting

JUDGE