

JUDGMENT SHEET
IN THE LAHORE HIGH COURT,
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

Writ Petition No.359 of 2022

Marriam Bibi and others **V/S** *Azhar Iqbal and others*

J U D G M E N T

Date of hearing	07.09.2022
Petitioner(s) by	Mr. Shaukat Aziz Siddiqui, ASC with Hunble Murad Siddiqui, Advocate.
Respondent(s) by	Mr. Zeeshan Munir Peracha, Advocate for Respondent No.1 along with Nauman Munir Peracha, ASC.
	Rashid Mehmood, Civil Judge 1 st Class/Research Officer assisted by Barrister Aiema Asrar and Fatima Midrar, Advocates. Mr. Sajid Khan Tanoli, DAG, Asif Ikram, Assistant Attorney General and Mirza Asif Abbas, Assistant Advocate General.

“Women will only have true equality, when men share with them the responsibility of bringing up the next generation”.

Justice Ruth Bader Ginsburg, Judge, US Supreme Court

JAWAD HASSAN, J.

The Context

This constitutional petition will decide an important question of law with regard to procedure provided for fixing maintenance allowance enacted in shape of Section 17A(4) of the Family Courts Act, 1964 (the “*Act*”) which is being ignored frequently by the Family Courts resulting into arbitrarily fixing amount of maintenance and passing of stereotype orders/judgments eventuating in serious miscarriage of justice in utter disregard of intent of Statute; pathology of Section 17A(4) of the Act; anatomy of Schedule under Section 5, Part-1 and judicial anthology of the decisions of apex as well as this

Court which are binding on the Family Courts under Article 189 and 201 of the Constitution of Islamic Republic of Pakistan, 1973 (the “*Constitution*”).

The Issue

2. The subject matter, is of great technical complexity, but the legal question which falls for determination by this Court is the fixing of maintenance allowance by the Family Court without considering the provisions of law and how it can be applied for the benefit of parties at lis. The Petitioners through this constitutional petition under Article 199 of the Constitution have assailed the judgments & decrees dated 30.09.2021 and 10.01.2022 (the “*impugned judgments*”), only to the extent of quantum of maintenance fixed respectively by Senior Civil Judge (Family Division), Attock and Additional District Judge, Attock.

I. BACKGROUND IN OUTLINE

3. A suit for recovery of gold ornaments, dowry articles etc. as well as for recovery of maintenance allowance and *iddat* allowance was filed by the Petitioners under the West Pakistan Family Courts Act, 1964 [amended through Family Courts (Amendment) Act, 2015] and the Family Court, after framing of issues and recording of evidence of the parties, passed the final judgment and decree dated 30.09.2021 thereby fixing maintenance of the minor at rate of Rs.5,000/- per month, agitated to be without taking into consideration the daily routine life necessities/demands/needs of the child. The said judgment and decree was assailed by the parties through their respective appeals which ultimately were dismissed through consolidated judgment and decree dated 02.12.2021. Hence, this Petition.

The question for this Court is whether the Family Court, through the impugned judgments and decrees have rightly fixed maintenance allowance. This is a pure question of law, but an understanding of its implications requires at least a bare summary of the technical context in which it arises. A full description of the technical context may be found in the judgments of the Courts below.

II. PETITIONER'S SUBMISSIONS

4. Mr. Shaukat Aziz Siddiqui, ASC submits that Respondent No.1/Azhar Iqbal being a man of means could easily pay maximum amount on account of maintenance, as prayed by the Petitioners but this aspect of the matter has not been attended to by the Courts below. He maintains that Petitioner No.1, in order to prove her case, produced on record certain material documents having not been rebutted by Respondent No.1 in his written statement or through evidence, but both the Courts below have erred in law while fixing a meager quantum of maintenance allowance of minor. He adds that the Petitioners proved the financial status of Respondent No.1 being an employee of Atomic Energy Department and earning more than Rs.100,000/- per month, whereas the Respondent No.1 also admitted his liability to maintain the minor/Petitioner No.2, but @ Rs.1,500/- per month and also to pay maintenance allowance for iddat period to Petitioner No.1 @ Rs.2,000/-. Further argued that, during cross examination, Respondent No.1 admitted the suggestion reading as follows:

"یہ بات درست ہے کہ میں نے 19 ہزار تنخواہ کی بابت کوئی پے سلپ اپنے جواب کے ساتھ نہ لگائی ہے۔ یہ درست ہے کہ محکمہ اٹامک کی تنخواہیں اچھی ہیں۔"

5. Mr. Shaukat Aziz Siddiqui, ASC has drawn attention of the Court towards Section 17-A(4) of the "Act", which clearly states that the Family Court may summon the relevant record from any organization, body or authority to determine the estate and resources of the Respondent/father, before fixing the maintenance allowance but this exercise has not been carried out in the case in hand. He relies on the judgment reported as "Muhammad Asim and others versus Mst. Samro Begum and others" (PLD 2018 SC 819) in which the Hon'ble Supreme Court of Pakistan, at paragraph No.6, has held that "*where a husband is required to maintain his wife or child the Judge Family Court should try to ascertain the salary and earning of the husband who is required to pay maintenance.*" Further reliance is placed on the

judgment passed by this Court in the case of “*Khalid Mahmood versus Naseem Akhtar and others*” (2019 MLD 820).

III RESPONDENTS’ SUBMISSIONS

6. Conversely, Mr. Zeeshan Munir Peracha, Advocate vehemently objected to the maintainability of this Petition and defended the impugned judgments and decrees. He added that Respondent No.1 was a security guard in NESCOM School and his salary was Rs.19,000/- per month, therefore, he is unable to meet with whims and wishes of Petitioners to manage and pay decreed maintenance allowance.

7. Arguments Heard. Record Perused.

IV DETERMINATION BY THE COURT

8. Nub of the matter in this case is how the Family Court can proceed for fixing maintenance allowance as per Section 17-A(4) of the “Act”, which requires interpretation. Before interpreting abovesaid Section, the guidance is sought from Lord Jonathan Sumption, former Judge of UK Supreme Court who stated that “*judges are meant to interpret laws but, increasingly, they make them. In the past few decades, legislatures throughout the world have suffered from gridlock. In democracies, laws and policies are just as soon unpicked as made. It seems that Congress and Parliaments cannot forge progress or consensus. Moreover, courts often overturn decisions made by elected representatives*”.¹ as referred to by this Court in “*M/S BIO-LABS PRIVATE LIMITED Versus PROVINCE OF PUNJAB others*” (PLD 2020 Lahore 565).

9. Moreover, guidance is also sought from Justice Antonin Scalia, Judge of US Supreme Court who stated “*in exploring the neglected art of statutory interpretation, the judges resist the*

¹Trials of the State: Law and the Decline of Politics, (Profile Books, London UK-First Edition 2020) by Lord Jonathan Sumption, UK Supreme Court

temptation to use legislative intention and legislative history. Hence, it is incompatible with democratic government to allow the meaning of a statute to be determined by what the judges think the lawgivers meant rather than by what the legislature actually promulgated. Eschewing the judicial lawmaking that is the essence of common law, judges should interpret statutes and regulations by focusing on the text itself".² as referred to by this Court in "RELIANCE COMMODITIES PVT LTD Versus FOP (Secretary Revenue) etc" (PLD 2020 Lahore 632 = 2020 PTD 1464 = (2021 124 TAX 490 (H.C. Lah). So, for the purpose of addressing the matter elucidated hereinabove and to reach up to a just and absolute conclusion, onward discussion shall follow moot points mentioned here under:

1. *Whether the Family Court has powers to fix maintenance allowance on it's own volition arbitrarily or otherwise is required to assess the quantum for maintenance as per provisions of Section 17-A(4) of the "Act"?*
2. *What is meant by terms assets and resources referred in Section 17-A(4) of the "Act"?*
3. *Generally or in particularized state of non-availability of sufficient evidence on behalf of parties, whether the pleadings/ averments set forth by the parties to the suit are enough for determination of quantum of maintenance or the Family Court should embark upon inquiry about 'estate' and 'resources' of the defendant for finally fixing up maintenance allowance?*

MOOT POINT No.1 (Fixation of maintenance)
(Pathology of Section 17A(4) of the Act).

10. The pathology of Section 17A(4) of the Act has to be examined in the light of judgment of Hon'ble Supreme Court of Pakistan rendered in "MUHAMMAD ASIM and others Versus MST. SAMRO BEGUM and others" (PLD 2018 SC 819) wherein it was held that *"a husband is required to maintain his wife or child the Judge Family Court should try to ascertain the salary and earning of the husband who is required to pay maintenance"*. The said

²A Matter of Interpretation: Federal Courts and the Law - New Edition (The University Center for Human Values Series Book 47) Kindle Edition by Justice Antonin Scalia, Judge, US Supreme Court.

section was amended and substituted by way of the Punjab Family Courts (Amendment) Act, 2015 (Act XI of 2015) w.e.f. 18.3.2015 and purpose of bringing the amendment has exhaustively been dilated upon by the Hon'ble Supreme Court of Pakistan in "Mst. YASMEEN BIBI and Versus MUHAMMAD GHAZANFAR Khan and others" (PLD 2016 SC 613) where it has been held that "*the Legislature felt essential to provide for establishment of Family Courts to deal with all matrimonial disputes, mentioned above, in an expeditious manner, curtailing the life of litigation in such cases. To curb and suppress the mischief of delaying tactics on the part of unscrupulous husbands, several amendments were introduced to the Family Court Act, 1964*". Pertinently, in Family Courts, issue of maintenance allowance is dealt with under Section 17-A of the "Act" which is reproduced for ready reference as under:

17A. Suit for maintenance:—

(1) *In a suit for maintenance, the Family Court shall, on the date of the first appearance of the defendant, fix interim monthly maintenance for wife or a child and if the defendant fails to pay the maintenance by fourteen day of each month, the defence of the defendant shall stand struck off and the Family Court shall decree the suit for maintenance on the basis of averments in the plaint and other supporting documents on record of the case.*

(2) *In a decree for maintenance, the Family Court may:*

(a) *fix an amount of maintenance higher than the amount prayed for in the plaint due to afflux of time or any other relevant circumstances; and*

(b) *prescribe the annual increase in the maintenance.*

(3) *If the Family Court does not prescribe the annual increase in the maintenance, the maintenance fixed by the Court shall automatically stand increased at the rate of ten percent each year.*

(4) *For purposes of fixing the maintenance, the Family Court may summon the relevant documentary evidence from any organization, body or authority to determine the estate and resources of the defendant.*

11. Whilst determining and fixing maintenance allowance, in addition to mode prescribed in section 17-A (4) *ibid*, setting in motion section 17-B of the “Act” may be helpful as well, which reads as follows:

17-B. 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.

12. Section 17-A of the “Act” was amended in 2015, wherein Section 17-A(1) starts with the words “*suit for maintenance*” and it deals with the interim maintenance of wife and the child, whereas Section 17-A(4) deals with final maintenance allowance. In order to elucidate and interpret Section 17-A(1) *ibid* the legislature has emphasized to pay interim maintenance on first appearance of the defendant. Upon assiduous perusal of the provisions of Section 17-A *ibid*, it can be gleaned that the use of the terms “fix” and “fixing” in sub-section 1 and 4 of the said Section 17-A is of much relevance. The term “fix” in itself is defined by the Black’s Law Dictionary as “*to liquidate or render certain*”. Whereas, “fixing” is the act of doing so. The, use of both said terms “fix” and “fixing” respectively arise in Section 17-A (1) of the “Act” to fix interim maintenance and in Section 17-A (4) of the “Act” for fixing final maintenance.

13. The question now arises whether the Family Court has unguided un-fettered and un-bridled and arbitrary powers to fix maintenance while employing its discretionary dominion at its discretion or is it required to proceed on pragmatic, rational and judicial basis? The answer, of course, is that it should proceed on the latter. Family Court should adopt an objective approach and broadly look into the social status of the parties, the earning of the defendant, his capacity to pay and most importantly, the requirements of the claimants while fixing the maintenance.

14. It cannot be denied at all that a husband is under legal, moral and religious obligation to maintain his legally wedded wife. Section 272 of Mohammdan Law by Mullah provides that husband is bound to maintain his wife so long she is faithful to him and obeys his reasonable orders but he is not bound to maintain her if she refuses herself to him or otherwise disobeys. Section 278 postulates that if a husband refuses to maintain his wife, she may sue for maintenance. Hence, it is the obligation of husband to pay *Nafqa* or maintenance, if construed in accordance with the principles as laid down in "*HIDAYA*" translated by Charles Hamilton in Chapter XV such as "*Nafqa*", in the language of law, signifies all those things which are necessary to support of life, such as food, clothes and lodging. Moreover, it is further demonstrated that when a woman surrenders herself into the custody of her husband, it is incumbent upon him to supply her with food, clothing and lodging, whether she be a Muslim or an infidel, because maintenance is a recompense for matrimonial restraint, whence it is that where a person is in the custody of another on account of any demand, or so forth, his subsistence is incumbent upon the other. The jurisprudence developed by Islam demonstrates that it is the duty of a Muslim wife to perform her part of obligation first for setting in with claim of maintenance. The husband may refuse to maintain his wife when she refuses to live with him and if a wife refuses to live in the house of her husband and not ready to perform her part of duty and denies to live with him as his wife, she is not entitled for maintenance.

15. In Islamic law, a father is under legal, moral and religious obligation to maintain his children till the age specified by law/sharia and it shall not be out of context to mention here that his such obligation originates from esteemed dictates of Holy Quran reading as follows:

"And clothing and maintenance must be borne by the father in a fair manner." [AL-BAQARAH, 233].

16. Such obligation of father has time and again been recognized, elaborated and emphasized by August Supreme Court of Pakistan. It has been held in case titled "*Humayun Hassan V. Arslan Humayun and another*" (PLD 2013 Supreme Court 557) reading as follows:

"4. Heard. 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. ...".

17. Following the same dictates, it was held in case titled "*Syeda Farhat Jahan V. Syed Iqbal Hussain Rizvi and another*" (2010 YLR 3275) reading that:

"it is the legal and moral duty of the father of minor children to keep maintaining them he being the natural guardian till they attain the age of majority. No excuse, big or small can absolve the father from his duty of maintaining his minor children which duty has been ordained on him through divine revelation of Allah Almighty."

18. After discussing obligations of husband/father to maintain his wife/children, it shall be quite appropriate to return to relevant law governing claim of maintenance allowance. It is held in case titled “Lt. Col. Nasir Malik V. Additional District Judge, Lahore and others” (2016 SCMR 1821) as follows:

“6. ... The legislature has established the Family Courts for expeditious settlement and disposal of the disputes relating to marriage and family affairs and the matters connected therewith. Under the provision of section 5 of the Family Courts Act, the Family Court is vested with the exclusive jurisdiction to entertain and adjudicate upon the matter specified in the schedule. The matter of maintenance is at serial No. 3 in the schedule. Thus, the Family Court has exclusive jurisdiction relating to maintenance allowance and the matters connected therewith. ...”.

MOOTPOINT NO.2 (Meaning of Estate and Resources)

19. This Court is in no doubt that the Family Court should keep in consideration the following aspects and legal requisites before passing the interim and final maintenance allowance under Section 17-A(1 and 4) *ibid*:

- (i) *Basis of averments in plaint;*
- (ii) *other supporting documents on record;*
- (iii) *summoning all relevant documentary evidence;*
- (iv) *determining the estate; and*
- (v) *determining resources of the defendant.*

20. Unfortunately, in this case the Family Court did not consider the aforesaid aspects and legal requisites and decided the case on the basis of mere oral averments without making sure production of easily available documents on record, summoning all relevant documentary evidence and determining the estate and resources of the defendant to ascertain his financial status and capacity to pay. Record reveals that the Respondent No.1 during cross examination has himself admitted non-production of his salary/pay slip as well as factum of substantial

status of salaries of Atomic Energy Department, but the Court did not correctly weigh this part of evidence while deciding the matter.

Anatomy of Section 17A(4) of the Act regarding Estate and Resource

21. The Family Court, after above referred admissions of Respondent No.1, had not been left clueless, helpless and handicapped, rather said admissions invited attention of the Family Court to invoke provisions of Section 17-A (4) *ibid* for immediate rescue, rather it was bound to step ahead for determining the ‘estate’ and ‘resources’ of Respondent No.1 to meet with ultimate cause of justice for final fixing of maintenance allowance in issue. Attending situation makes it necessary to define and interpret the words “**estate**” and “**resources**” mentioned in Section 17-A (4) *ibid*, dictionary meanings whereof are as follows:

ESTATE:

- i. The term ‘estate’ has been defined in the Black’s Law Dictionary (A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier. Published in 1856) as:
“the interest which any one has in lands, or in any other subject of property”.
- ii. While ‘estate’ has also been defined in its most extensive sense as:
“signifying everything of which riches or, fortune may consist and includes personal and real property”.
- iii. Cambridge Dictionary defines estate as:
“everything that a person owns when they die”,
- iv. Macmillan Dictionary defines estate as:
“all the property and money that belongs to someone, especially someone who has just died”.
- v. Thus, an ‘estate’ may be defined as comprising all that can be constituted as the net worth of an individual, which includes all assets that an individual may have a controlling interest in.

RESOURCES:

- i. The term ‘resources’ has been defined in Black’s Law Dictionary as:

“money or any property that can be converted into supplies; means of raising money or supplies; capabilities of raising wealth or to supply necessary wants”

- ii. Moreover, Cambridge Dictionary defines resource as:

“a useful or valuable possession or quality that a person or organization has, for example, money, time, or skills.”

- iii. Merriam Websters defines resources as:

“(a) a source of supply or support (b) a natural source of wealth or revenue (c) a natural feature or phenomenon that enhances the quality of human life, (d) computable wealth and (e) a source of information or expertise.”

22. Inferentially, it is not out of place to further peruse the provisions stipulated in Sections 11 and 39 of the Income Tax Ordinance, 2001 (the “Ordinance 2001”), which encapsulate the gist of the definition reproduced above by way of stating range of sources of income. Section 11 of the Ordinance 2001 states that the income can be classified under the heads of salary, income from property, income from business, capital gains and income from other sources, whereas Section 39 of the Income Tax Ordinance, 2001 provides that head of income from other sources includes dividend, royalty, profit on debt, additional payment on delayed refund under any tax law, ground rent, rent from sub-lease of land or a building, income from the lease of any building together with plant or machinery, income from provision of amenities, utilities or any other service connected with the renting of building, annuity or pension, prize bond etc. and such other sources defined therein. Thus, benefit may be fetched from said Sections 11 and 39 of the Income Tax Ordinance, 2001 for purpose of determining what were the ‘estate’ and ‘resources’ of the Respondent No.1 falling in Section 17-A(4) of the “Act”.

MOOT POINT NO.3

(Duty of the Family Court to inquire on Estate and Resources of Husband)

23. It is also worth mentioning here that the Family Court is established under Section 3 of the “Act” and it has jurisdiction to deal with the matters under Sections 4 and 5 of the “Act”, where certain powers conferred under the law are procedural in nature and some are substantial in nature. The Family Court so established under Section 3 of the “Act” has been specifically conferred clear mandate for expeditious settlement and disposal of family disputes and related matters as per its Preamble. In the case of “Haji Muhammad Nawaz v. Samina Kanwal and others” (2017 SCMR 321) it is held that “Family Court, whether as a trial court or an executing court, is governed by the general principles of equity, justice and fair play”. The main object of the “Act” is for protection and convenience of the weaker and vulnerable segments of the society i.e. women and children. Moreover, it is held in case titled “Farzana Rasool and 3 others V. Dr. Muhammad Bashir and others” (2011 SCMR 1361) as follows:

“21. The object of the Act is to minimize the technicalities and procedural bottlenecks for the purpose of speedy justice between the parties in shortest possible time and in shortest possible manner. The Act has changed the forum and also altered the method as to how the trial under the Act is to be proceeded and case decided.”

Procedure to be followed by the Family Courts

24. For implementation of purpose of the “Act” aimed at much needed expeditious disposal of disputes, the “Act” has brought in certain powers, procedure and parameters for the Family Courts for being adhered to. Hence, there can be no qualms about the fact that the Family Court has to exercise its powers so conferred vide provision of Section 17-A of the “Act”. Thus, the Family Court is

legally obliged to assess the quantum of maintenance as per dictate and criteria mentioned in Section 17-A(4) of the “Act”.

25. By examining the record of the case and the impugned judgment passed by the Family Court, it transpired that the Petitioner appeared as PW1 and she in her documentary evidence has adduced the list of dowry articles and other documents, but the Respondent No.1 only appeared as DW1 producing mere an affidavit without adducing any other document. The Respondent No.1 admitted during cross-examination that he did not annex the pay slip even with his written statement. Credentials of employer of the Respondent No.1 and his holding job with said employer are the facts having not been denied by him and in such a situation, the Family Court had the power to summon his service/salary record, which process was not set in field. The Family Court while deciding the issues No.1 and 2 together observed:

“So for as quantum of maintenance allowance is concerned, the stance of the plaintiff is that the defendant is man of means and doing his job in Atomic Energy and his salary is more than Rs.1,00,000/-.The defendant has negated the said version and has taken plea that he is security guard in NESCOM. The Plaintiff should have submitted the salary slip of the defendant to establish the exact financial status of the defendant but she has failed.

26. Notwithstanding the fact that (Respondent or Petitioner) was unable to procure and bring on record salary slip of the Respondent No.1, he himself was obliged to bring on record documents showing his monthly salary as is desired in the case of “MUHAMMAD ASIM and others Versus MST. SAMRO BEGUM and others” (PLD 2018 SC 819), wherein it has been observed that:

“6. That as regards the learned counsel's contention that the earnings of the Muhammad Asim are not known, we deprecate this attempt at intentional non-disclosure. Muhammad Asim is employed by PAEC but elects not to disclose his position or salary; he thus seeks to take advantage of his own willful non-disclosure.

Where a husband is required to maintain his wife, former wife during her iddat period or child and is required to pay maintenance, including the arrears of maintenance, his present and past earnings must be disclosed by him, because his financial status determines the amount of maintenance that should be awarded. In case of non-disclosure an adverse inference can be drawn against him. his conduct further betrays that he does not want to be fair and has unnecessarily embroiled his former wife and child in needless litigation. ”.

27. Moreover, after pleading and asserting stance of his monthly salary @ Rs.19,000/- Respondent No.1 was obliged to produce in his evidence the legally reckoned record to prove said stance, but he fell short of ground to meet with the purpose. In addition to said shortfall on part of Respondent No.1, even the Family Court did not bother to actuate inquiry under Section 17-A (4) of the “Act” for summoning the relevant record for determination of the ‘estate’ and ‘resources’ of the Respondent No.1 nor the mode enacted in section 17-B of the “Act” was followed, instead the Petitioner was assumed to prove the financial status of the Respondent No.1 despite that it apparently wasn’t possible for her to secure and produce his salary slip/service record.

28. In connection thereto, time and again formulated guidelines as well as principles settled by superior courts are overlooked by the Family Court. In a bright/clear situation of above-mentioned inability of Respondent and shortfall on his part, Family Court itself was empowered to step ahead with procedure enunciated in sections 17-A (4) and 17-B of the “Act” for requisite inquiry destined for absolute and unambiguous determination of his ‘estate’ and ‘resources’ including his salary/monthly income to finally fix maintenance allowance in issue. Non-adherence of law, formulated guidelines and settled principles thus can’t be guarded for being allowed to breath any further.

Judicial Anthology of the Procedure

29. At the cost of repetition, it has to be emphasized here again that inquiry for determining ‘estate’ and ‘resources’ of Respondent No.1 was quite necessary for fixing a justifiable quantum of maintenance allowance. For instance, bending upon necessity of inquiry even for fixation of interim maintenance allowance, certain principles are formulated in case titled “Muhammad Tauseeq Danial Bhatti V. Ayesha Naeem and 2 others” (2021 MLD 337 Islamabad) whilst holding as follows:

“15.

vii. *The financial status of father could also be considered on the basis of facts narrated in pleadings of the parties. which includes the living standard and previous matrimonial life of the parties in which the mother/wife has been provided with particular kind of living, housing facilities, transportation, gifts, immovable properties of husband and the lifestyle in which husband/father was living prior to separation or divorce or before the institution of suit for maintenance.*

viii. *In cases, where father being civil servant or employee of any organization, department or company has not appended his salary slips or bank statements, the Family Court shall ask for an undertaking or affidavit regarding his salary and thereafter shall fix the interim maintenance, however after the trial of the case, if the court comes to the conclusion that at the time of fixation of interim maintenance allowance the father/husband has stated a fact beyond his pleadings or undertaking, which is found to be false, such father be burdened with heavy costs and action of perjury may also be initiated against him.*

ix. *The Family Court may also call the employer of father, HR department, admin department, bank managers, land revenue department, tax record, and banking details as well as salary details of the father directly from*

the relevant offices while deciding the question of interim maintenance for a prima facie view to fix the allowance in favour of minor so that no inadequacy is attributed while fixing the maintenance allowance."

30. Though annual increase in decreed maintenance allowance was reduced, however inquiry with regard to financial status of father was made incumbent upon Family court in case titled "Tauqeer Ahmad Qureshi V. Additional District Judge, Lahore and 2 others" (PLD 2009 Supreme Court 760) holding that:

"9. The minors are entitled to be maintained by the father in the manner befitting the status and financial condition of the father and for this reason the Family Court is under an obligation while granting the maintenance allowance, to keep in mind the financial condition and status of the father. It has to make an inquiry in this regard. It cannot act arbitrarily or whimsically. It was not a reasonable exercise of authority by the Family Court. It is well-settled that the judicial officers are required to act justly and fairly and reasonably in discharge of judicial functions. ..."

31. Again, sensitizing inquiry for determining financial capacities of a father for fixation of maintenance allowance, it is held in case titled "Muhammad Shakir V. Additional District Judge, Islamabad-West and 5 others" (2021 CLC 809 Islamabad) as follows:

*"17. The principle *ibid*, guides to hold that before determination of the quantum of the maintenance, the learned Family Court, is under obligation to determine the financial capability of the father vis-a-vis the amount claimed in that respect. The test provided for the purpose is that there should be some tangible, concrete and confidence inspiring material preferably in the shape of documents and thereafter proper maintenance is to be fixed."*

21. ... the awarded maintenance appears to be excessive and in contravention of the financial capability of the petitioner particularly, when there is nothing on record regarding his financial capability. The amount so fixed thus warrants modification.

22. The sequel of above discussion is that while fixing maintenance, both the learned courts have overlooked the important aspects highlighted in para-14 (supra), which are essential to determine the financial capability of the father vis-à-vis independent source of income of the respondent No.3/mother. It was incumbent upon the courts to determine the income of the father for which recourse in terms of subsection (4) of section 17(A) of the West Pakistan Family Courts Act, 1964 can be adopted which is meant to facilitate the court to determine the financial position of the father.”

32. The language of Section 17-A(4) is unambiguous to the extent that it clearly empowers the Family Court, by stating that it “may summon the relevant documentary evidence from any organization, body or authority”. In pursuance of which the Courts have held that the Family Court has to call upon the “...employer of father, HR department, admin department, bank managers, land revenue department, tax record, and banking details as well as salary details of the father directly from the offices...”, as was the case in “Dr. Aqueel Waris vs. Ibrahim Aqueel Waris” [2020 CLC 131].

33. Gearing in process under section 17-A(4) of the Act, it was emphasized by this court for determination of salary of father for fixing of maintenance allowance in case titled “Khalid Mehmood V. Naseem Akhtar and others” (2019 MLD 820) reading as follows:

“6. As far as quantum of maintenance allowance of minors/ respondents is concerned; it would be advantageous to reproduce Section 17-A(4) of The Family Courts Act, 1964 as under:
"For purposes of fixing the maintenance, the Family Court may summon the relevant documentary evidence from any organization, body or authority to determine the estate and resources of the defendant."

34. Again, determination of financial status and income of the father was observed as necessary for fixing maintenance allowance in case titled “Nazia Bibi and others V. Additional District Judge, Ferozewalla and others” (PLD 2018 Lahore 916) holding that:

“7. ... 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.

....

8. 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.

9. 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.

10. In this regard, it is noted that Section 17(A) of the West Pakistan Family Courts Act, 1964 specifically provides in subsection (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.”

35. Highlighting necessity of inquiry for determination of financial status of father, it is observed in case titled “Nosheen Agha and another V. Additional District Judge (West) Islamabad and another” (2015 CLC 349) reading as follows:

“15. However, the learned Trial Court as well as the learned Appellate Court while decreeing the suit did not refer to any material on the basis of which quantum of maintenance was adjudged. This error floating on the surface amounts to negation of the requirement contained in section 17-B of Family Courts Act, 1964, because both the Courts on one hand failed to inquire into the financial position of defendant/ husband and also did not take into account the justification in the context of normal needs of minor girl in custody of her mother.”

36. Whilst dealing with question of finally decreeing maintenance allowance after striking down defense of father due to non-payment of interim maintenance allowance, it is held in case titled “Shahzad

Hussain V. Judge Family Court, Lahore and 2 others” (2011 CLC 820Lahore) reading as follows:

“21. 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.”

Judicial Anthology of UK and US Judgments

37. It is not out of place to refer here how the Courts of United Kingdom (UK) and Unites States of America (USA) determine maintenance. Upon examination of the laws of UK and USA, it is notable that the Courts of foreign jurisdiction travel similar lengths for ascertaining the quantum of maintenance as envisaged under Section 17-A(4) of the “Act”. The UK method of determining maintenance is more like tax, related only to the income figure. Furthermore, this approach delineates that Child Maintenance Service (CMS) uses the latest full tax year data from HM Revenue and Customs (HMRC) without needing to request it from any other source in order to determine the maintenance amount with reference to income. Whereas, Lady Hale in “Smith (FC) (Appellant) vs. Secretary of State for Work and Pensions and another (Respondents)”[2006 UKHL 35] = [2006 WLR 2024], provided auxiliary to the term ‘earnings’ and defined it to include amount after deduction of income tax, national insurance contributions and half of any retirement annuity premium. In the United States, the Supreme Court of Florida, in “Bowen vs. Bowen”[471 So. 2d 1274 (1985)] while elucidating the non-payment of maintenance amount referred to the relevance of producing “all proof such as pay-stubs, income tax returns, doctor's statements, receipts, etc.,”

38. Judicial resources need to be promptly and consistently available to litigants for the core functions of fact finding, particularly when law itself is available for rescue. Therefore, in all cases where the occupation, job or source of income of the person is definite and identified and of such a nature remuneration, income or earnings wherefrom can be traced in a documented form then by all extent and measures, it is the duty of the Family Court to ascertain the 'estate' and 'resources' of the defendant defined above, in all such cases where the same stands undetermined or pleadings are evasive or just formal without substantive or believable proof in this regard and by way of summoning the relevant documentary evidence instead to settling with sole reliance upon the pleadings/averments of the parties without due application of mind and exercise of its powers specifically conferred by way of legislation. It is neither unusual nor whimsical for the Family Courts to delve into the relevant documentary evidence dealing with the financial status of the defendant to determine the maintenance.

39. Addressing another aspect of issue in hand and evaluating facts with another angle, record transpires that the Family Court further held in the judgment that:

“There is no documentary proof available on the record to establish that the actual salary is more than Rs.1,00,000/-. It is well settled law that the Parties should prove their respective versions through their respective evidence and mere oral assertions are not sufficient.”

40. It is to be highlighted that at one hand the Family Court held that there is no documentary proof regarding salary of the Respondent, but on the other hand arbitrarily fixed the final maintenance allowance of the minor @ Rs.5000/- per month with 10% annual increase by itself assuming the financial status of the Respondent, origination and strength of which assumption may be traced and tracked from nowhere and mode of fixing maintenance allowance so adopted is clearly contrary to the powers conferred to

the Family Court under Sections 17-A(4) and 17-B of the “Act” as well as in violation to the fundamental rights of the Parties guaranteed under umbrella of the Constitution.

41. Importantly, Article 4 of the Constitution clearly states that it is inalienable right of subjects to be treated in accordance with law and no action detrimental to their reputation, life, and liberty shall be taken except as per law. It is imperative to note that women and children approaching the Court in family matters are protected by Article 4 of our Constitution and, therefore, must be treated in accordance with the law laid down in S.17(A) of the “Act”. Article 4 is an established practice that is deep rooted in the custom and usage of law and, therefore, it cannot be overlooked and disregarded by any Court. To reiterate a well settled principle, “*to apply and to adhere to law is not a mere technicality, rather it is a duty cast upon the Court as per Article 4*”: “*SYED TAHIR HUSSAIN MEHMOODI and others Versus AGHA SYED LIAQAT ALI and others*” [2014 SCMR 637] is referred.

42. Furthermore, Article 10-A of The Constitution of Pakistan, 1973 provides right of fair trial and due process for determination of rights and obligations of parties. The maxim goes “*boni judicis est ampliare justitiam*” i.e. the good judge’s duty is to extend justice. And justice can only be extended, when something is done in accordance with law. For enforcement of Article 10-A *ibid*, it has been held in case titled “*Federation of Pakistan through Secretary Finance, Islamabad and another V. E-Movers (PVT.) Limited and another*” (2022 SCMR 1021) as follows:

“24. When the law stipulates that something has to be done in a particular manner that is how it should be done. And any person who exercises authority must do so in accordance with law. The right to be treated in accordance with law was invigorated and bolstered when the Constitution was amended to provide an additional Fundamental Right by adding Article 10A to the Constitution stipulating that, 'For the determination of his

civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.¹³² The due process requirement must be met in the determination of rights and obligations. The Constitution does not define due process. Therefore, it would not be appropriate to limit its scope by defining it. But this does not mean that the due process requirement is a meaningless concept. Rather due process incorporates universally accepted standards of justice and is not dependent upon any law or laws. It is an all-encompassing expression which may not be curtailed with reference to particular laws. Due process is to be understood holistically by keeping in mind the entire Constitution, which excludes arbitrary power, authoritarianism and autocratic rule.”

43. Moreover, The Hon’ble Supreme Court of Pakistan in the judgment reported as “Mst. Yasmeen Bibi and Muhammad Ghazanfar Khan and others” (PLD 2016 SC 613) has exhaustively dilated upon the purpose of bringing the Act and Amendment therein. The relevant paragraphs of the said judgment are as under:

“10. It was in the above background that the Legislature felt essential to provide for establishment of Family Courts to deal with all matrimonial disputes, mentioned above, in an expeditious manner, curtailing the life of litigation in such cases. To curb and suppress the mischief of delaying tactics on the part of unscrupulous husbands, several amendments were introduced to the Family Court Act, 1964.

.....

12. Keeping in view the agonies of the parties, particularly the wife, in matrimonial disputes to curtail the mischief of delay and to shorten the life of litigation in such cases, the Law and Justice Commission of Pakistan recommended to the Federal Government and all the Provincial Governments to establish Family Courts in each District and Tehsil Headquarter, which shall be preferably presided over by a female Judge so that the wives who are not well acquainted and familiar with the court

proceedings are provided maximum protection and friendly environments.

.....
 14. *It is demonstrably clear from these drastic amendments made in the Family Courts Act including the new provisions added therein, that the Legislature was well aware of the miseries and plight of the wives, seeking relief through the obsolete law then in vogue thus, to minimize the same not only all matrimonial disputes were brought under one and the same umbrella of the Family Court but also provided for the target date, both for the Family Court and for the Appeal Court, by which such cases shall be decided conclusively.”*

44. It is well established that the procedural laws are enacted to advance cause of justice and not to thwart the same, which intent of law is no doubt always aimed at the welfare of its subjects. So, it is need of the day to employ legislated processes that are more accessible and more responsive for children, parents, and families. The Family Courts must adopt therapeutic and holistic approach to the Court structure and processes, as well as to decision making in family disputes.

45. Therapeutic jurisprudence applied in the family law context means that courts must focus on achieving outcomes that positively affect and even improve the lives of individuals, children, and families involved in family litigation, which approach definitely has the potential to facilitate problem-solving and to positively enhance the quality of the parties’ daily lives, thereby rendering a more effective outcome for individuals and families. Articles 4, 9 and 14 are to be read with Article 35 of the Constitution, which cast upon duty on the State to protect the marriage, the family, the mother and the child. Since Article 35 of the Constitution relates to public importance as per judgment reported in “BARRISTER MUHAMMAD AHMED PANSOTA Versus FOP etc” (PLD 2020 Lahore 229) therefore, the family Court must be consisting with due process of law as provided under Article 4 of the Constitution which states that the

Court proceedings must be consistent with due process of law, as judicial orders involve important legal rights and constitutional values, otherwise general opinion would criticize the current family justice system and emphasize that the adversary process does not meet the needs of litigants who look to the courts for solutions.

46. While examining the jurisprudence laid down in family matters, this Court has noticed that Family Courts are not properly following the procedure in this regard as time consuming litigation in shape of family suits involving issue of maintenance allowance are being decided without adhering provisions of Section 17-A (4) of the Act and procedure laid down therein, which is meant to aid none else but to advance cause of justice as the intent of legislature involved therein was to equip Family Court with easily enforceable mode enabling absolute and just determination of 'estate' and 'resources' of husband/father for fixing maintenance allowance.

47. However, adjudications in Family Courts reflect their detachment from the realities of the current socio-economic situations of the Country. Stereotype orders are passed arbitrarily and mechanically, that too, in deviation to the legislation which can benefit nothing, but they will make way for multiplication of litigation amongst parties forcing them not only into unfathomable agonies, but burdening them with certain financial obligations as well ending up in further economic distress and plight. As already, the Hon'ble Supreme Court of Pakistan in "MST. YASMEEN BIBI Versus MUHAMMAD GHAZANFAR KHAN and others" (PLD 2016 SC 613) has held that "*keeping in view the agonies of the parties, particularly the wife, in matrimonial disputes to curtail the mischief of delay and to shorten the life of litigation in such cases, the Law and Justice Commission of Pakistan recommended to the Federal Government and all the Provincial Governments to establish Family Courts in each District and Tehsil Headquarter, which shall be preferably presided over by a female Judge so that the wives who are not well acquainted and familiar with the court proceedings are provided maximum protection*

and friendly environments". Judicial pronouncements beyond aspirations of law and by way of bypassing readily available legislated procedure/mechanism merit no space in society. As had been noted by Lord Chancellor Hailsham in "*Hyman v Hyman*" [1929] AC 601,614, the power of the court in securing a sufficient provision for the wife was not only in her interest but in the interest of the public. This Court also concurs that adjudication in all cases must be done with due application of mind and exercising the legally conferred powers, so that it is the public at large that shall be benefited from the verdict.

48. For what has been discussed above and seeking guidance from the binding judgment of the Hon'ble Supreme Court of Pakistan under Article 189 of the Constitution reported in "*MUHAMMAD ASIM and others Versus MST. SAMRO BEGUM and others*" (PLD 2018 SC 819) which has elaborated and enunciated principles of law regarding award of maintenance allowance by Family Courts, this writ Petition is **allowed** and by setting aside the judgment and decree of both the Courts below to the extent of maintenance allowance of minor only, the case is remanded back to the Family Court to decide it afresh to this extent in the light of aforesaid observations and strictly following the criteria laid down under Section 17A and 17-B of the Act, within a period of two (02) months from the date of receipt of certified copy of this judgment.

49. The Registrar of this Court is also directed to make sure transmission of copy of this judgment to all District Judges of the Punjab for its circulation amongst Family Courts discharging duties under their supervision for strictly following provisions of the "Act" in true spirit whilst dealing with issue of fixing maintenance allowance. A copy of this judgment shall also be sent to Director General, Punjab Judicial Academy which functions under Section 4 of the Punjab Judicial Academy Act, 2007 and prescribes manner of training to judicial officers in terms of Section 5 of the Act *ibid*.

50. Before parting with this judgment, efforts of senior Advocate Mr. Shaukat Aziz Siddiqui, ASC, Mr. Zeeshan Munir Peracha, Advocate, Mr. Rashid Mehmood, Civil Judge 1st Class/Research Officer, Barrister Aiema Asrar, and Fatima Midrar, Advocate are highly appreciated for their able assistance in the case in hand.

(JAWAD HASSAN)
JUDGE

Approved for Reporting

JUDGE

*Usman**