

Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Constitution Petition No. S – 1174 of 2023

Present
Mr. Justice Muhammad Jaffer Raza

Kashif Ali Memon Petitioner.

Versus

Mst. Zoya Respondent

Mr. Ahmed Hussain Jokhio Advocate for the appellant.
Mr. Aftab Ahmed Memon, Advocate for the Respondent.

Date of Hearing: 25.03.2025
Announcement of Judgment: 15.04.2025

J U D G M E N T

MUHAMMAD JAFFER RAZA-J: The instant petition has been preferred by the Petitioner impugning the judgment and decree dated 06.10.2023 and 13.10.2023 respectively, in Family Appeal No.19/2023. Brief facts of the case are as follows: -

2. The Respondent has filed Family Suit No.324/2021 with the following prayers: -

“a) That this Honourable Court may be pleased to direct Defendant to pay maintenance to Plaintiff for herself at the rate of Rs.25,000/- per month and for child at Rs.20,000/- per month including food, clothing, bedding, medical expenses, education and other necessities of life for her child from July 2017 till today total amount of Rs.2,340,000/- (Twenty three lac, forty thousand only) for last 04 years and four months and also in future at the same rate per month including maintenance of Plaintiff and her child) or at increased ratio as this Honourable Court may fix under the circumstances.

- b) That the Defendant shall bear the costs of the suit.
- c) That any other relief which this Honourable Court may deem fit and proper in the interest of justice.

3. Thereafter vide judgment dated 22.09.2022 the said suit was partially decreed to the extent of the minor only at the rate of Rs.5,000/- per month from the date of passing interim order dated 04.02.2022 till the date of passing of judgment. Future maintenance was computed at the rate of Rs.10,000/- per month till the entitlement of the minor with 10% annual increment. However, in reference to the Respondent/Plaintiff it was held that she is not entitled for any maintenance till she joins the Petitioner and observes conjugal rights.

4. Thereafter, the Respondent preferred Family Appeal No.19/2022 and the judgment of the Family Court was modified to the extent that the Respondent was held to be entitled for maintenance at the rate of Rs.10,000/- per month from the time when she was residing and looked after by her parents from 30.07.2017. The Petitioner was further directed to continue paying maintenance at the same amount to the Respondent in future also. The remaining findings of the learned Family Court were held to apply mutatis mutandis to the parties.

5. Learned counsel for the Petitioner has argued that the order of the trial Court was in accordance with law and the Appellate Court in modifying order has gone beyond the scope of Section 14 of the Family Court Act, 1964 (**“the Act”**). He has stated that the Respondent is not entitled for maintenance on the ground that she does not live with the Petitioner and is unable to perform her conjugal obligations, which disentitle her from her claim of maintenance.

6. Conversely learned counsel for the Respondent has argued that the Respondent has not left the house of the Petitioner by her will, as she was removed from the house on 30.07.2017. He has further argued that after waiting many years the Respondent filed the suit for maintenance on

15.11.2021. It was further argued that during the pendency of the suit the Petitioner made no efforts for reconciliation with the Respondent to rejoin him and he has also not filed any suit for restitution of conjugal rights. It is further averred by the learned counsel for the Respondent, that the minor was born on 15.04.2017, but the Petitioner has failed to maintain the Respondent and the minor properly. He has argued through the record that prayer of the Petitioner for restitution of conjugal rights was only made by the Petitioner in his written statement filed before the trial Court. The said prayer was not granted and the said order has not been impugned by the Petitioner which proves only the lack of interest in resuming the marriage with the Respondent. He has further argued that issues were amended on an application filed by the Petitioner vide order dated 09.03.2022 and the trial Court incorrectly allowed that application and the amended issue No.1 was wrongly framed. The said issue amended issue is reproduced as under:

“Whether the Plaintiff is a disobedient wife, unable to perform conjugal obligation towards Defendant and is disentitled to claim her maintenance?”

7. This issue accordingly to the learned counsel for the Respondent was derogatory, to say the least. Lastly, the learned counsel has argued that the trial Court had placed the burden on issue No.1 entirely on the Respondent and incorrectly held that the Respondent has failed to prove her case of past maintenance. Learned counsel in this regard placed reliance in **M. Hamad Hassan v. Mst. Isma Bukhari and 2 others**¹ and **Mst. Tayyeba Ambreen and another v. Shafqat Ali Kiyarni and another**².

8. I have heard both the learned counsel and perused the record. It is evident on the bare perusal of record that no evidence in regard to the “disobedience” was led by the Petitioner and neither was this plea taken explicitly during evidence. Disentitlement of the Respondent in this regard

¹ 2023 SCMR 1434

² 2023 SCMR 246

towards maintenance is unconscionable and the judgment of the trial Court in this regard is not sustainable. I have also perused the cross-examination of the Respondent and hold that she has stated that her father maintained both her and the minor and the Petitioner has failed to maintain them. It is settled law that father/husband is duty bound to maintain his wife and children. The existence of marriage is not disputed. Otherwise the Petitioner has claimed that he is financially sound, but he has not discharged his obligatory rights towards the Respondent and his minor.

9. The limited scope of Constitutional Petitions, more specifically in matters related to family law, was expounded in the case of **M. Hamad Hassan** (supra) in the following words: -

“6. The objective of Article 199 of the Constitution is to foster justice, protect rights and correct any wrongs, for which, it empowers the High Court to rectify wrongful or excessive exercise of jurisdiction by lower courts and address procedural illegality or irregularity that may have prejudiced a case. However, it is emphasized that the High Court, in its capacity under Article 199, lacks the jurisdiction to re-examine or reconsider the facts of a case already decided by lower courts. Its role is limited to correcting jurisdictional errors and procedural improprieties, ensuring the proper administration of justice. In the present case, the Petitioner pursued his case through the family court and its appeal in the district court and then also invoked the High Court's constitutional jurisdiction to reargue his case amounting to a wrongful exercise of jurisdiction whereby the High Court upheld the factual findings of appellate court after making its own assessments on the same. Allowing a re-argument of the case constituted to arguing a second appeal which should not have been entertained regardless of the outcome of the case.

7. The right to appeal is a statutory creation, either provided or not provided by the legislature; if the law intended to provide for two opportunities of appeal, it would have explicitly done so. In the absence of a second appeal, the decision of the appellate court is considered final on the facts and it is not for High Court to offer another opportunity of hearing, especially in family cases where the legislature's intent to not prolong the dispute is clear. The purpose of this approach is to ensure efficient and expeditious resolution of legal disputes. However, if the High Court continues to entertain constitutional petitions against appellate court orders, under Article 199 of the Constitution, it opens floodgates to appellate litigation. Closure of litigation is essential for a fair and efficient legal system, and the courts should not unwarrantedly make room for litigants to abuse the process of law. Once a matter has been adjudicated upon on fact by the trial and the appellate courts, constitutional courts should not exceed their powers by re-evaluating the facts or substituting the appellate court's opinion with their own - the acceptance of finality of the appellate court's findings is essential for achieving closure in legal proceedings conclusively resolving disputes,

preventing unnecessary litigation, and upholding the legislature's intent to provide a definitive resolution through existing appeal mechanisms.”

10. The Honourable Supreme Court in the case of **Mst. Tayyeba Ambreen and another** (supra) expounded on the tendency of using a claim for conjugal rights as a weapon to prevent payment of maintenance. It was held as under: -

“16. While claiming conjugal rights by a husband in response to the suit for dissolution of marriage, dower, dowry and maintenance, it is also an onerous responsibility of the Court to see whether he is sincerely fulfilling his obligations towards his wife, rather than gratifying the urges of male chauvinism. According to Paragraph 277 of Chapter XIV of "Principles of Muhammadan Law" (Ninth Edition), by D.F. Mulla under the nomenclature "Marriage" (M. Mahmood), "the husband is bound to maintain his wife (unless she is too young for matrimonial intercourse), so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to him, or is otherwise disobedient, unless the refusal or disobedience is justified by non-payment of prompt (section 290) dower, or she leaves the husband's house on account of his cruelty." Whereas Paragraph 281 provides that "where a wife without lawful causes ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights". The lodging of this claim should not be used as weapon to defend or obstruct the claim of dower or maintenance allowance, but must be lodged in good faith and with a bona fide intention to reconcile and rectify the issues between the spouses in order to save the matrimonial tie with magnanimity, kindness and through the fulfillment of the husband's obligations and not as a tool to fight out or frustrate the claim of maintenance allowance or dower amount. It is quite a strange situation that the petitioner No. 1 approached the Family Court for dissolution of marriage on the ground of cruelty but the respondent No. 1, quite the reverse, claimed conjugal rights despite all his ruthless, tyrannical and oppressive conduct or behavior, which claim on the face of it seems to be motivated with the sole intention to avoid paying the maintenance allowance and the dower amount and he ultimately succeeded in his effort in the Appellate Court whereby the dissolution of the marriage on account of cruelty was converted into a dissolution of the marriage by way of Khula with directions to the petitioner No.1 to refund the dower amount to the respondent No. 1.”

11. I agree with the contention of the learned counsel for the Respondent that the Petitioner is not interested in resuming his matrimonial relations with the Respondent. The Petitioner himself never filed a suit for restitution of conjugal rights. The said prayer, as noted above, was only taken in the

written statement. The said prayer was not granted and the Petitioner in this regard did not impugn the same at any forum. The contention of the learned counsel that he wishes to resume matrimonial relations with the Respondent is therefore devoid of force.

12. In light of what is held above, the Impugned Order does not require any interference, is therefore upheld. The instant petition is dismissed with no order as to cost.

JUDGE

Nadeem Qureshi "PA"