SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Shariat Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, CJ.

Raza Ali Khan, J.

Civil Appeal No.70 of 2020

(PLA filed on 09.01.2020)

Aamir Afzal s/o Muhammad Afzal r/o Gaseetput Tehsil and District Mirpur.

……..APPELLANT

v e r s u s

1. Shazida Ashraf wife of Aamir Afzal.
2. Tahira Batool daughter.
3. Muhammad Saim son of Aamir Afzal (2,3) minors through real mother Shazida Ashraf r/o Gaseetput Tehsil and District Mirpur.

…RESPONDENTS

[On appeal from the judgment and decree of the Shariat Appellate Bench of the High Court, dated 09.12.2019, in family appeal No. 68 of 2019]

FOR THE APPELLANT: Sh. Masood Iqbal, Advocate.

FOR THE RESPONDENTS: Written arguments by Ch. M. Younas Arvi, Advocate.

Date of hearing: 28.07.2021

JUDGMENT:

Raza Ali Khan, J.–The titled appeal, by leave of the Court, has arisen out of the judgment passed by the Shariat Appellate Bench of the High Court *(hereinafter to be referred as High Court)*, dated 09.12.2019, whereby the appeal filed by the respondents, herein, has been accepted partly and the judgment and decree of the Family Court has been modified to the extent of the recovery of past maintenance allowance.

2. The relevant and necessary facts giving rise to the captioned appeal are that the plaintiff-respondents, herein, filed a suit for recovery of

maintenance allowance before the Judge Family Court, Mirpur stating therein that the defendant-appellant, herein, contracted marriage with Shazida Ashraf, plaintiff-respondent No.1, herein, and out of their wedlock two children namely, Tahira Batool and Muhammad Saim, were born. It was stated that prior to the birth of Muhammad Saim, the appellant, herein, went abroad and the plaintiff No.1 alongwith the minor was forcibly ousted from the house by the grandfather of defendant-appellant in June 2010. It was further stated that the plaintiff, Muhammad Saim was born in the house of plaintiff's parents and defendant-appellant failed to maintain them, therefore, a decree for recovery of maintenance allowance at the rate of Rs. 5000/- per month in favour of plaintiff No.1 and maintenance allowance at the rate of Rs. 10,000/- each for the plaintiffs (minors) may be passed. On filing of the suit, the

defendant was summoned who contested the suit through special attorney Shabbir Abbas (real brother), by filing written statement and refuted the claim of plaintiffs. The learned Family Court framed issues in the light of pleading of the parties and after necessary proceedings, the learned Judge Family Court passed the decree for recovery of the maintenance allowance in favour of the plaintiff-respondent that she is entitled to receive Rs. 4000/- per month from the date of institution of the suit till she remains in Nikkah whereas, the plaintiff-respondents No. 2 & 3 were declared entitled to receive the maintenance allowance at the rate of Rs. 4000/- each per month, alongwith 10% annual increment from the institution of the suit vide its judgment and decree dated 07.05.2019. Feeling dissatisfied from the judgment and decree of the trial Corut, the respondents, herein, preferred an

appeal before the High Court. After necessary proceedings the learned High Court has accepted the appeal partly in the following manner:-

> *"Consequently, I partly accept the appeal and impugned judgment and decree is hereby modified in the terms that plaintiffs-appellants are entitled to receive past maintenance Rs. 2000 each for a period of six years which is reckoned as 432000/- as past maintenance whereas, the remaining part of the decree shall be kept intact."*

This judgment of the learned High Court is the subject matter of the instant appeal by leave of the Court.

3. Sh. Masood Iqbal, the learned Advocate for the appellant after narration of the necessary facts submitted that the impugned judgment of the learned High Court is against law, the facts and the record of the case. He argued that the learned High

Court has not appreciated the record in its true perspective while passing the impugned judgment. He further argued that the respondents have failed to prove their case with cogent evidence but despite this the trial Court passed a decree in their favour. He submitted that the element of cruelty has not been proved by the respondent but this aspect escaped the notice of the High Court. He further submitted that the appellant always performed his matrimonial obligations but the learned High Court failed to consider this important aspect of the case and ignored the evidence brought on record. He contended that respondent No.1, herein, left the house of the appellant with her free will and without the consent of the appellant, hence, she is not entitled for past maintenance. He further submitted that the learned Family Judge has rightly passed the decree which is quite in accordance with law and

the learned High Court was not justified to modify the same. He stressed on the point that respondent No.1 was not entitled for the past maintenance on the basis of cruelty as she herself admitted in her statement before the Family Court that the appellant/husband neither beat her at any time, nor deserted her from the house, but despite that the learned High Court disturbed the well-reasoned judgment and decree of the Family Court and illegally modified the same to the extent of past maintenance. He finally prayed for setting aside the impugned judgment.

4. On the other hand, Ch. Muhammad Younas Arvi, the learned Advocate for the respondents has already filed an application for treating the concise statement as the arguments. In the concise statement the stance taken by the learned Advocate is that the impugned judgment of

the learned High Court is quite in accordance with law which does not call for any interference by this Court. It has been averred that the learned trial Court failed to appreciate the evidence and fixed the insufficient amount of maintenance allowance. The appellant, herein, is living abroad in Greece and is financially very strong, therefore, he is able to pay the past maintenance allowance fixed by the learned High Court. It has further been averred that respondent No. 1 has no other source of income and it is the duty of the father to maintain his children. Respondents have not been paid any maintenance allowance from last 7/8 years by the appellant and this fact has also been proved by the respondents through cogent evidence. It is further averred that the learned High Court has rightly observed in the impugned judgment that cruelty is not only confined to the physical torture rather it

includes the mental torture and hateful attitude of the husband as well. It is lastly averred that the learned High Court has not committed any illegality while passing the impugned judgment, therefore, this appeal is not maintainable which is liable to be dismissed.

5. We have heard the learned advocates for the parties and have gone through the record of the case made available. For doing complete justice, we have also appreciated the evidence produced by the parties minutely.

6. The perusal of the record divulges that the suit for recovery of maintenance allowance was decreed by the learned Family Judge in the terms that respondent No.1, herein, is entitled to get Rs.4000/- per month and the minor respondents are entitled to get Rs. 10,000/- each. The learned High

Court on appeal, modified the judgment and decree of the trial Court to the extent of past maintenance allowance while observing that the respondents are entitled to receive past maintenance allowance at the rate of Rs. 2000/- for a period of six years.

7. The cumulative appreciation of the evidence reveals that respondent No.1, herein, in support of her version produced two witnesses and got recorded her statement as well. She deposed in her statement that:-

"اس وقت نابالغان مظہرہ کے پاس ہیں۔ مظہرہ اس وقت اپنے والدین کے ساتھ رہ رہی ہے۔ مظہرہ آٹھ سال سے والدین کے گھر رہ رہی ہے اور بچے کی پیدائش بھی والدین مظہرہ کے گھر ہی ہوئی تھی۔ ان 8 سالوں کے دوران مدعاعلیہ نے کبھی مظہرہ یا نابالغان کو کوئی خرچہ وغیرہ نہ دیا ہے اور نہ ہی ان 8 سالوں کے دوران مدعاعلیہ نے ہم سے کوئی رابطہ کیا ہے۔ مدعاعلیہ بیرون ملک یونان ہوتا ہے۔ مظہرہ اور نابالغان کا خرچہ 20 سے 25 ہزار روپے ماہانہ آجاتا ہے۔ خرچہ والدین مظہرہ برداشت کر رہے ہیں۔ مدعاعلیہ نے مظہرہ کو طلاق نہ دی ہے۔ نابالغ سکول جاتے ہیں بچی کی

سکول فیس ایک ہزار روپے جبکہ بچے کی سکول فیس 8 سو روپے ہے۔ مدعاعلیہ نے 8 سالوں کے دوران نہ تو خرچہ دیا ہے اور نہ ہی آبادی کی کوئی کوشش کی ہے۔"

Her deposition clearly shows that she was neither paid any maintenance allowance from 7/8 years nor she was contacted by the appellant. This version of respondent No.1 is also supported by the witnesses produced by her. The plaintiffs' witness Tanveer Ashraf s/o Muhammad Ashraf deposed in his statement that:-

" مدعیہ نمبر 1 تقریباً 2 سال مدعاعلیہ کے گھر آباد رہی اس دوران ایک بچی پیدا ہوئی۔ جسکا نام سحر بتول ہے۔ دو سال تک میاں بیوی راضی بازی تھے بعد میں لڑائی جھگڑا ہوا مدعیہ نمبر 1 کی ساس نے مدعیہ کو گھر سے نکال دیا اسکے بعد مدعیہ اپنے والدین گھر آباد ہو گئی ۔ دوران غیر آبادی والدین کے گھر قیام کے دوران بھی مدعیہ کے ہاں ایک بیٹا پیدا ہوا۔ بیٹے کے پیدائش کے اخراجات والدین مدعیہ نے برداشت کئے۔ مدعیہ 2010 سے اب تک پنے والدین کے گھر رہ رہی ہے۔ 2010 سے تاحال مدعیان کے اخراجات والدین مدعیہ برداشت کر رہیے ہیں"

The learned Advocate for the appellant has contended that respondent No.1, left the house of the plaintiff with her own free will, has no substance, as the abovesaid deposition of the plaintiff's witness clearly shows that the mother-in-law of respondent No.1, ousted her from the house. It is an admitted fact that the appellant went abroad after two years of marriage and remained there for the last 7/8 years. Nothing has been placed on the record that during these years, the appellant provided maintenance allowance to respondent No.1. Mere a statement of the appellant's witnesses that he has provided maintenance to her and borne all the expenses of the respondent and minors, is not acceptable. If for the sake of arguments, the statements of the witnesses are presumed to be true, even then they should have produced the receipts of the remittance from whom it can be

ascertained that the appellant paid the maintenance allowance to the respondents. Respondent No.1 has claimed that she was ousted from the house of the appellant in the year 2010 and since then, she is residing at her parents' house and during this period, she was neither paid the maintenance allowance nor was contacted by the appellant, hence, she faced mental agony, stress and depression. Here the question arises that whether the mental torture and agony faced by the respondent from the last 7/8 years, amounts to cruelty or not? In our considered view, the cruelty is not only limited to the physical torture rather it includes the mental torture and hateful attitude of the husband and other family members. The term 'cruelty' with reference to matrimonial matter is to be judged within the parameters of statutory provision of section 2 of the Dissolution of Muslim

Marriages Act, 1939, which speaks of different kinds and natures of cruelty. The term 'cruelty' is not only confined to physical assault or inflection of physical injuries rather it, being a comprehensive term as elaborated in the statutory provisions which includes all types of cruelty which may be classified as legal, mental and physical. The word 'cruelty' in Black's Law Dictionary (Eighth Edition) is defined as under:-

> *"**Cruelty**. The intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human; abusive treatment; outrage.*
>
> *'legal cruelty', cruelty that will justify granting a divorce to the injured party; specif., conduct by one spouse that endangers the life, person, or health of the other spouse, or creates a reasonable apprehension of bodily or mental harm.*
>
> *'mental cruelty'. As a ground for divorce, one spouse' course of conduct (not involving actual*

> *violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse.*
>
> *'physical cruelty'. As a ground for divorce, actual personal violence committed by one spouse against the other.*

(Underlining is ours)

The dictionary meaning of word 'cruelty' clearly shows that cruelty may be mental or physical. It is also celebrated principle of law that for proof of cruelty, it is not necessary that physical assault or injury is required to be proved rather sometimes, the conduct and behaviors without physical assault has also been treated by the Courts as cruelty. Even the mental torture suffered by the wife due to behaviors of her husband or other inmates of house/ family of husband can also be treated as cruelty. Cruelty by conduct of the appellant, herein, also justifies that the respondents

are entitled to receive past maintenance allowance. Our this view is fortified from the reported judgment of this Court titled *Muhammad Zaheer-ud-Din Babar vs. Mst. Shazia Kausar & others [2015 SCR 621],* wherein, it was held that:-

> *"The cruelty is not confined only to physical torture. Even the cruel attitude is not confined only to the extent of physical violence, it includes the mental torture, hateful attitude of the husband or other inmates of the house also include other circumstances, in presence of which the wife is forced to abandon the house of her husband.*

The same view has been taken by this Court in the case reported as Mst. Amreen vs. M. Kabir & others [2014 SCR 504], wherein, it has been held that:-

> *"The cruel attitude is not confined only to the extent of*

> *physical violence, it includes the mental torture, hateful attitude of husband or other inmates of the house and also includes other circumstances, in presence of which the wife is forced to abandon the house of her husband".*

8. The next question which arises was also seriously opposed by the learned counsel for the appellant that the past maintenance for a period of six years cannot be granted and the learned High Court has committed grave illegality in this regard. This proposition has already been resolved authoritatively by this Court in the case reported as *"Mst. Zaibun vs. Mehrban" [2004 SCR 108]*. It was observed by this Court that:-

> *"After perusing the Family Courts Act, 1993, it can safely be held that the past maintenance can be granted by the Family Court but in view of the fact that there is no specific article providing limitation for filing suits for maintenance therefore*

the resort can be had to the residuary Article 120 of the Limitation Act which prescribes six years as limitation, therefore it is held that the past maintenance of six years can be granted and beyond that the claim would be barred by limitation. This proposition finds support from a case reported as Muhammad Aslam vs. Mst. Zainab Bibi and 3 others [1990 CLC 934] where the following observations were made:-

"4. There can be no cavil that the provisions of Limitation Act 1908 are applicable to proceedings before the Family Court and further that section 3 of the Limitation Act obliges a Court in no un-mistakeable term to reject the claim if it is beyond the time prescribed by the first schedule to the Act. There is no specific Article in the Schedule providing limitation for filing suits of maintenance with the result that the resort must be had to the residuary Article 120 of the Limitation Act which prescribes 6 years period as limitation. A Division Bench of this Court in Muhamad Nawaz vs. Mst. Khurshid Begum and others [W.P No. 35 of 1969]

decided on 15th December, 1969 was called upon to consider the question as to whether the past maintenance could be granted by the Arbitration Council under the Muslim Family laws Ordinance, 1961, and if so, for what period. It was held:

……It is conceded by the learned counsel that there is no Article in the Schedule to the Limitation Act dealing specifically with the question of the recovery of past maintenance, and for the reason the matter may be said to be governed by the residuary Article 120 which prescribes a period of six years. The past maintenance in the present case has been allowed by the Arbitration Council expressly for a period of five years and ten months which would therefore, appear to be within the period of limitation as obtaining under Article 120 of the Schedule to the Limitation Act.'

This judgment was affirmed in appeal by the Supreme Court of Pakistan in the case reported as Muhammad Nawaz vs. Mst. Khurshid Begum and three other [PLD 1972 SC 302]. The above

quoted observations of the Division Bench were approved by the Supreme Court in the following manner:-

…….In the present case, the High Court has considered the question of limitation and has come to the conclusion that Article 120 of the Limitation Act applies to the facts of the present case and the claim of the respondent was not barred by limitation. In this view of the matter, we are satisfied that the High Court has rightly held that the Arbitration Council was competent to award past maintenance."

The trial Court has not taken into consideration the whole evidence and material brought on record. Thus, the conclusion drawn is result of misreading and non-reading of evidence. The learned High Court has rightly modified the judgment and decree of the trial Court to the extent of past maintenance.

Consequently, we are constrained to upheld the impugned judgment and decree of the learned High Court dated 09.12.2019. This appeal, having no substance in it, is hereby dismissed with no order as to cost.

CHIEF JUSTICE JUDGE

Mirpur