SUPREME COURT OF AZAD JAMMU AND KASHMIR

(SHARIAT APPELLATE JURISDICTION)

PRESENT:

Kh. Muhammad Naaseem, J.
Muhammad Younas Tahir, J.

Civil Appeal No.42 of 2021
(PLA filed on 21.11.2020)

Mohammad Ibrahim Ahmed Saeed son of Saeed Khan, caste Sudhan, r/o pallandri (Kohi), Tehsil and District Sudhnoti.

….APPELLANT

VERSUS

1. Nusrat Parveen daughter of Mohammad Amin Khan, caste Sudhan, r/o Pallandri, Tehsil and District Sudhnoti.
2. Dania Shaheen daughter of Mohammad Ibrahim Saeed (minor) through her real mother namely, Nusrat Parveen, caste Sudhan, r/o Pallandri, Tehsil and District Sudhnoti.

…. RESPONDENTS

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 01.10.2020 in family appeals No.81 & 82 of 2019)

FOR THE APPELLANT: Syed Atif Gillani, Advocate.

FOR THE RESPONDENTS: Mr. Asghar Ali Malik, Advocate.

Date of hearing: 30.11.2021

ORDER:

Muhammad Younas Tahir:- The titled appeal by leave of the Court has been directed against the judgment of the Shariat Appellate Bench of the High Court, dated 01.10.2020, whereby the appeals filed by both the contesting parties have been disposed of.

2. The facts necessary for disposal of this appeal are that the respondent filed two suits; one for recovery of the gold ornaments and other for recovery of the maintenance allowance; whereas, the appellant, herein, filed cross suit for restitution of conjugal rights in the Court of Judge Family Court Pallandri. The trial Court consolidated the suits and after necessary proceedings, decreed the suit filed by the respondent, herein, for recovery of maintenance allowance and also the suit filed by the appellant for restitution of conjugal rights, whereas, the suit filed for recovery of gold ornaments was withdrawn by the plaintiff-respondent, herein. Both the

parties feeling dissatisfied filed the separate appeals before the learned Shariat Appellate Bench of the High Court. The learned Shariat Appellant Bench of the High Court disposed of the appeals in the following terms:-

> "‥ Due to overall inflation now-a-days Rs.3,000/- is very little amount to maintain her minor daughter. The impugned decree for monthly maintenance allowance is modified in the terms that the Dania Shaheen the minor is held entitled to monthly maintenance allowance @ Rs.5,000/- per month from the respondent/defendant from the date of desertion i.e. 24.01.2007 along with 10% yearly increase shall be added for further period of his majority of minor (appellant) whereas the appeal is dismissed to the extent of appellant Nusrat Parveen…
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> ...the Court below rightly decreed the suit for restitution of conjugal rights in favour of Mohammad Ibrahim the appellant subject to that the appellant shall be bound to pay maintenance to the defendant along with his minor daughter and provide them separate portion of residence whereas as the defendant along with her minor

daughter shall be bound to populate with the plaintiff."

Appellant, herein, feeling dissatisfied from the impugned judgment, filed instant appeal by leave of the Court.

3. Syed Atif Mushtaq Gillani, Advocate, learned counsel for the appellant argued that the impugned judgment is against law and the record. He further submitted that the learned Shariat Appellate Bench of the High Court wrongly modified the judgment of the trial Court and enhanced the amount of maintenance allowance Rs.5000/- per month from the date of desertion i.e., 24.01.2007, along with 10% annual increase. According to the learned counsel gross misreading and non-reading of evidence was committed by the learned trial Court as well as the first appellate Court while delivering the judgment. The learned counsel further averred that the maintenance allowance can only be ordered from the date of filing of suit for maintenance, therefore, both the Courts below fell in error of law while allowing maintenance allowance from the date of desertion. He lastly, requested for acceptance of appeal. The learned counsel relied upon the case reported

as *Muhammad Aslam Khan vs. Mst. Akbar Jan & 2 others* [PLJ 1991 SC(AJK) 32], *Mst. Zaibun vs. Mehran* [2004 SCR, 108], *Abdul Khaliq vs. Sidra Khaliq & 3 others* [2014 SCR 280] and *Mst. Amreen vs. Muhammad Kabir* [2014 SCR 504]. He lastly requested for acceptance of this appeal.

4. While controverting the arguments Mr. Asghar Ali Malik, Advocate, learned counsel for the respondents submitted that the impugned judgment is perfect and in accordance with law and the facts and also based on strong and solid reasons. He further submitted that no misreading or non-reading has been pointed out by the learned counsel for the appellant. According to the learned counsel for the respondents the instant appeal has been filed without any lawful justification, the same is liable to be dismissed. The learned counsel further argued that before the trial Court plaintiff-respondent, herein, witnesses have never been cross-examined by the opposite side, therefore, truthfulness of the witness cannot be challenged at this stage by the learned counsel for the appellant. The learned counsel further emphasized that the plaintiff-respondent had left the house of the appellant, herein, on 24.01.2007, due to

cruel behavior, which is very much evident from the record of the trial Court. The appellant, herein, purposely avoided to populate plaintiff-respondent, herein, even otherwise under relevant provision of law husband is bound to pay the maintenance allowance being husband of respondent No. 1 and father of respondent No.2, at the place where they are residing. He lastly requested for dismissal of the appeal. The learned counsel relied on case reported as *Lal Begum & 26 others vs. Qayyum Khan & 6 others* [2016 SCR 107]. He lastly requested for dismissal of the appeal.

5. We have heard the learned counsel for the parties and gone through the record made available.

6. At the very outset of the arguments, the learned counsel for both the parties agreed upon the maintenance allowance to the extent of respondent No.2, minor daughter of the appellant and respondent No.1, as enhanced by the learned Shariat Appellate Bench of the High Court. Thus, submission made by the learned counsel for the parties in respect of the maintenance allowance to the extent of respondent No.2 , at the rate of Rs.5000/- from the date of desertion i.e. 24.01.2007 along with 10% annual increase need not to be further deliberated upon.

7. As far as the contention of the learned counsel for the appellant regarding restitution of conjugal rights in favour of Mohammad Ibrahim is concerned, a careful perusal of the impugned judgment transpires that the learned Shariat Appellate Bench of the High Court as well as the learned trial Court rightly decreed the suit in respect of restitution of conjugal rights subject to payment of maintenance allowance. The appellant herein, failed to substantiate that during desertion of his wife, respondent, herein, or pendency of the suit he had paid any maintenance allowance to the respondents, herein. In over considered view both the Courts below have rightly decreed the suit regarding restitution of conjugal rights conditioned upon payment of maintenance allowance, to respondent No.1. On the other hand the respondent No. 1 has proved her case beyond any doubt that the appellant did dissertated her and later failed to maintain her which he was otherwise bound to maintain under law and sharia. Except in certain conditions, if husband fails to pay maintenance then wife may seek dissolution of marriage on this sole ground of non-payment of maintenance allowance, meaning thereby that maintenance allowance is

not an ex-gratia grant rather right of wife in consideration of performance of conjugal rights. Our this view is supported by the case reported as "*Mst. Iqra vs. Abuzar"*, [2012 SCR 284], as under:

> "8. In Islam a husband is bound to maintain his wife throughout the period she remains in matrimonial bonds with him. Maintenance to the wife is not an ex gratia grant but husband is obliged to maintain his wife as has been held in a case reported as Iqbal Hussain v. Deputy Commissioner/Collector, Lahore and 3 others (PLD 1995 Lah. 381), wherein it has been observed as under:-
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> "10. This consensus amongst Muslim Jurists was given effect to by the legislature by enacting the Dissolution of Muslim Marriages Act,1939.That Act placed an obligation on the husband to maintain his wife who was entitled to seek a decree for dissolution of marriage in the event of his failure to do so. After this enactment, the maintenance could no longer be said an ex gratia grant. Consequently, no reliance can be placed on the principles stated in Hedaya, Fatawa-i-Alamgiri and Fatawa-i-Kazi Khan mentioned above."

However, the objection of the appellant regarding declaration of the trial Court and upheld by the Shariat Appellate Bench of the High Court regarding payment of past maintenance allowance to respondent No. 1, from the

date of desertion i.e., 24.01.2007, has legal substance. Both the Courts below have failed to appreciate the matter in instant case and resolve the matter in legal manner as per the principle of law laid down by this Court, which limits the extent of grant of past maintenance up to six years. Under Article 42-B of the AJ&K Interim Constitution, 1974, every decision of the Supreme Court is binding on all the Courts in Azad Jammu and Kashmir, if a question of law is decided or the decision is based on the principle of law or it enunciates a principle of law The Supreme Court of AJ&K being the apex Court of the State and it is prerogative of the Supreme Court to interpret the law and all the lower Courts, including the High Court of AJ&K and other organs of State are bound by the law as declared and settled by the Supreme Court. The principle of stare decisis as reflected in Article 42-B, of the AJ&K Interim Constitution, 1974 and Article 189 of the Constitution of Islamic Republic of Pakistan, is meant to create certainty in judicial pronouncements in matter of similar nature and to avoid divergent opinions of the Courts while interpreting law or setting any principle of law. The principle of stare decisis means to adhere to

precedent and not to unsettle things which are already established through the previous pronouncements of the Apex Court. There are numerous judgments of this Court and the Supreme Court, which may be placed here for making reliance in support of our above view, however, we place reliance on the judgment of this Court in case reported as "*Muhammad Sajjad Khan vs. Abdul Qadoos Khan And 3 Others*" [2018 YLR 1985], which is as under:

> "It may also be observed that the Supreme Court is the apex judicial forum of the State and it has to interpret the law while hearing appeals from the judgments of the High Court and the subordinate judiciary. It is the foremost duty as well as prerogative of the Supreme Court to interpret the law in a consistent and organized manner to avoid legal uncertainty. The law declared by the Supreme Court is binding on all the organs of the State, which are bound to follow the same and the subordinate Courts are always required to give utmost respect, regard and consideration to the judgment, in which the principle of law has been enunciated. Under section 42-B of the Azad Jammu and Kashmir Interim Constitution Act. 1974, every decision of the Supreme Court shall be binding on all the Courts in Azad Jammu and Kashmir, if a question of law is decided or the decision is based on the principle of law or it enunciates a principle of law. Section 42-B, ibid, is reproduced as under:
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> **"42.B. Decision of the Supreme**

> **Court binding on other Courts.** - Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Azad Jammu and Kashmir."

In the case reported Maroof Baig v. Azad Government and 8 others [2016 SCR 1359], it has been observed by this Court as under:-

> "9. Here, it may be observed that despite a number of judgments of this Court, the High Court while .deciding the writ petitions does not follow the judgments of this Court to the effect that the provisions of rule 32(2) of the High Court Procedure Rules, 1984, are mandatory and non-compliance of the rules results into dismissal of the writ petitions and applies the rule at its sweet will. In some cases the writ petitions are dismissed being filed in violation of rule 32(2) and in some cases the judgments of this Court on rule 32(2) of the High Court Procedure Rules, 1984, are ignored and the writ petitions are entertained. It is expected from the High Court that it shall follow the rule of law laid down by this Court."

Similarly, in the case reported as Muhammad Tariq Badr and another v. National Bank of Pakistan and 3 others, the Supreme Court of Pakistan, has laid down, as under:-

> " ...Moreover, for the purpose that a judgment of the apex Court should have due effect and due deference,

> three conditions as per "Khan Gul Khan others v. Daraz Khan (2010 S C M R 539) should be met (a) judgment decides question of law; (b) it is passed upon the basis of law; and (c) it enunciates the principle of law."

Subsection (3) of section 42-A of the Azad Jammu and Kashmir Interim Constitution Act, 1974, reads as under:-

> **"42-A. Issue and execution of processes of Supreme Court.**
> (1) .....
> (2).....
> (3) All executive and judicial authorities throughout Azad Jammu and Kashmir shall act in aid of the Supreme Court."

From a literal perusal of section 42-A(3) of the Azad Jammu and Kashmir Interim Constitution Act, 1974, it clearly depicts that not only the executive authorities of Azad Jammu and Kashmir but the judicial authorities are also bound to act in aid of the Supreme Court. In the case reported as Finance Department of AJ&K and 2 others v. Mazhar lqbal [2003 SCR 155], it has been held by this Court as under:

> "7. The refusal of Finance Department in the present case, in my view, as rightly pointed out by the High Court, is a clear violation of section 42-A(3) of the AJ&K Interim Constitution Act, 1974, which provides as follows:-
> '42-A(3). All executive and judicial authorities throughout Azad Jammu and Kashmir shall act in aid of the Supreme Court.'
> This command of Constitution,

> reproduced above, leaves no doubt that an enunciation of a principle of law is binding on all the judicial and executive authorities working in Azad Jammu and Kashmir. The executive as well as the judicial authorities are bound to act in aid of Supreme Court. In this view of the matter, the refusal on the part of Finance Department is unjustified and without any lawful authority.
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> 8. I have also noticed in various other matters that the Finance Department ignores the orders of this Court with contemptuous disregard and we will have to proceed against them when such occasion arises. I hope, that in future the Department will mend its ways and shall respect the orders of superior Courts of this country. The Constitution being the supreme law is not subordinate to the wishes and whims of the Finance Department or any other Department working in the territory of Azad Jammu and Kashmir."

A juxtapose reading of section 42-A(3) and section 42-B of the Azad Jammu and Kashmir Interim Constitution Act, 1974, makes it mandatory for the judicial authorities not only to follow the judgments of the Supreme Court as per the interpretation of law laid down by it in the judgment but also to act in aid of the Supreme Court.

10. The jurisdiction of the apex Court under the constitutional provisions is not just to decide the questions of law but the same also extends to enunciate the principles of law, which decisions and principles are binding on all other courts in the. State. The object behind it is to

> achieve the legal certainty, stability and predictabi¬lity and maintain the discipline in all ranks of judiciary. The deviation from the principle of stare decisis can breed a sense of injustice and uncertainty, further it may also lead to hamper trust of the litigants and the public at large on judiciary, therefore, passing of an order without taking into account the law declared by the Supreme Court amounts to deviation from it. Such practice is unpleasant and not healthy one, which is not expected in future."

In the instant case the respondent No. 1, herein filed the suit on 10.09.2015, with pray to grant maintenance allowance from the date her desertion i.e., 04.01.2007. The trial Court granted the maintenance allowance as was prayed by respondent No.1, from the aforesaid date of her desertion, which is beyond six years and the appellate Court also upheld the same while committing the same legal error, which is not sustainable under law and the pronouncements of this Court. Our view is fortified by the judgment of this Court, wherein this proposition has already been resolved authoritatively, while declaring that grant of past maintenance beyond six is barred by limitation, 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."

Same view was reiterated by this Court in the case reported as "*Mst. Iqra v. Abuzar*" [2012 SCR 284], as under:

> "It is celebrated principle of law that wife can claim past maintenance upto six years. The definition of word 'maintenance' in Islam is 'Nafqa'. In the language of law it signifies all those things which are necessary to the support of life, such as food, clothes and lodging. The subsistence of the wife is incumbent upon her husband. When a woman surrenders herself into the custody of her husband, it is incumbent upon him thenceforth to support her with food, clothing and lodging, whether she be a Mussalman or an infidel, because such is the precept in Holy Quran. Such an obligation arises from the moment the wife is subject to the moral control of her husband and in certain cases for a time even after it is

dissolved. Similar view prevailed in a case titled Ghulam Habib v. Mst. Zubaida Khatoon (1992 CLC 1926), in which it has been held as under:-

> "4. Be that as it may, in Muhammad Nawaz v. Mst. Khurshid Begum and 3 others (PLD 1972 SC 302), it was held that Article 120 of the Limitation Act applies in respect of claim for past maintenance. The limitation provided in the Article is for a period of six years when the right to sue accrues, In the instant case, the impugned decree for maintenance was passed by the Chairman, Arbitration Council for a period of ten years and six months prior to the institution of the application, which was not warranted by law."

Thus, keeping in view the observations in the preceding paragraphs the judgment and decrees of the trial Court and the learned Shariat Appellate Bench of the High Court are modified to the effect that respondent No.1, is entitled to get past maintenance of six years from the date of institution of suit 10.09.2015. However, the remaining judgment and decree of the Shariat Appellate Bench of the Court is maintained.

Subject to above observations and modification the appeal is disposed of accordingly. There is no order as to costs.

JUDGE **JUDGE**

Muzaffarabad
07.12.2021

M. Ibrahim Saeed vs. Nusrat Parveen & others

ORDER:

The judgment has been signed. The same shall be announced by the learned Registrar after notifying the learned counsel for the parties.

JUDGE **JUDGE**
(iii) **(i)**

Muzaffarabad
07.12.2021