

**JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT**

W.P. No.25275 of 2022

Atta Muhammad

Versus

Addl. District Judge, etc.

J U D G M E N T

Date of hearing: 11.05.2023.

Petitioner by: Mr. Zafar Abbas Khan, Advocate.

Respondent No.7 by: Mr. Asif Ali Kahloon, Advocate.

MUHAMMAD SAJID MEHMOOD SETHI, J.- Through instant petition, petitioner has assailed the vires of order dated 18.2.2021 and judgment dated 17.12.2021, passed by learned Civil Judge and Addl. District Judge, Mianwali, respectively, whereby petitioner's request to cross-examine DW-4 was turned down by the Courts below.

2. Facts in brief are that respondent No.7, Mushtaq Ahmed instituted a suit for declaration to the effect that he alongwith petitioner and respondents No.8 to 11 are legal heirs of deceased Muhammad Abdullah, thus, are owners in possession of the suit house left by the deceased. Petitioner and respondent No.11 in their written statements contended that deceased Muhammad Abdulla gifted the suit house to Atta Muhammad/petitioner during his lifetime whereas respondent No.8/Mst. Sughran Bibi in her written statement alleged that no such gift was made and all legal heirs are entitled to get their shares from the suit house. In evidence, said respondent while appearing as DW-4 in her examination-in-chief and cross-examination conducted by learned counsel for plaintiff repeated her stance taken in written

statement. Later on, learned counsel for petitioner requested the Court that said witness be declared hostile and also sought permission to cross-examine the said witness. Learned Trial Court vide impugned order dated 18.2.2021 declined the request of the petitioner. Feeling aggrieved, the petitioner filed a revision petition before the learned Addl. District Judge, Mianwali, who vide judgment dated 17.12.2021 dismissed the same. Hence, this petition.

3. Learned counsel for petitioner submits that since the witness got recorded her statement adversely against the interest of the petitioner, therefore, petitioner is entitled to cross-examine her. Further submits that both the Courts below without observing the real facts of the case declined the request of the petitioner, hence impugned decisions are liable to be set aside.

4. On the other hand, learned counsel for respondent No.7 submits that Mst. Sughran Bibi herself appeared before the Court as independent witness in support of her own version and petitioner did not call or produce the said lady as witness in support of his version, therefore, the contention of petitioner to declare the said witness as hostile with permission to cross examine carries no weight.

5. Arguments heard. Available record perused.

6. Admittedly, petitioner and Mst. Sughran Bibi/respondent No.8 are co-defendants in the suit filed by respondent No.7. Respondent No.8 has endorsed the claim of plaintiff/respondent No.7 and in evidence as DW-4 supported his version unlike other defendants, who supported the stance of petitioner. The sole point for determination by this Court is "Whether a defendant has right to cross-examine the co-defendant? If so, in what circumstances?

7. The procedure of examination of witnesses is synchronized by Articles 130 to 161 of the Qanun-e-Shahadat Order, 1984. Article 130 aims to regulate procedure as to production and examination of

witnesses in the Court, while Article 132 elaborates three stages that might come while recording statement of a witness. First stage is examination-in-chief by the party who has produced a witness, second stage is cross-examination by the opposite party and third stage is re-examination, optional with the party calling the witness. For the sake of convenience, Article 132 (*ibid*) is reproduced hereunder:

132. *Examination-in-chief, etc.* (1) *The examination of a witness by the party who calls him shall be called his examination-in-chief.*

(2) *The examination of a witness by the adverse party shall be called his cross-examination.*

(3) *The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.*

8. The expression "adverse party" is defined in the Black's Law Dictionary, Sixth Edition at page 53, as "a party to an action whose interests are opposed to or opposite the interest of another party to the action". In general, an adverse party is an opposing party in a lawsuit.

9. It may be observed that there is no specific provision in the Qanun-e-Shahadat Order, 1984, providing opportunity to a defendant to cross-examine a co-defendant; however having regard to the object and scope of cross-examination, it is settled principle of law that when a statement is made against the interest of a party to the proceedings, before that evidence could be acted upon, the party should have an ample opportunity to cross-examine the witness, who had given the evidence against him. It is only after such an opportunity is given and the witness is cross-examined then evidence becomes admissible. In Sarkar on Evidence, Fifteenth Edition at pages 2182 and 2183, the following discussion is available:-

Right to cross-examine Co-Accused's and Co-Defendant's Witnesses. Sections 137 and 138 of the

Evidence Act do not specifically refer to cross-examination of co-defendant's witnesses. But the Court have to adopt a golden rule that no evidence shall be received against a co-defendant or co-accused who had no opportunity of testing it by cross-examination; as it would be unjust and unsafe not to allow a co-accused or co-defendant to cross-examine witness called by one whose case was adverse to his, or who has given evidence against him. Where it is shown that the interest between the defendants inter se conflict each other, the other defendant has necessarily to be treated as an adversary and he is certainly entitled to cross-examine the other or his witnesses. [Mohd. Ziaulla v. Sorgra Begum, 1997 AIHC 2628 (2629-2630) (Kant)]

No special provision is made in the Evidence Act for the cross-examination of the co-accused's or co-defendant's witnesses. But the procedure to be adopted may be regulated by the well-known rule that no evidence should be received against one who had no opportunity of testing it by cross-examination; as it would be unjust and unsafe not to allow a co-accused or co-defendant to cross-examine witness called by one whose case was adverse to his, or who has given evidence against. If there is no clash of interest or if nothing has been said against the other party, there cannot be any right of cross-examination.

In "Phipson on Evidence", Tenth Edition, para. 1538., it is provided that:

A defendant may cross-examine a co-defendant or any other witness who has given evidence against him, and reply on such evidence though there is no issue joined between them. (Lord v. Colvin, 3 drew 222; Allen v. Allen {1894} P. 248 (C.A.); RE Wagstaff, 96 L.T. 605; Dryden v. Surrey C.C. {1936} 2 All E.R. 535).

It is clear from the above that evidence becomes admissible after only it passes through the process of cross-examination by the adverse party regardless of the fact that the adverse party is a plaintiff or co-defendant. However, the condition precedent is the conflict of interest. Reference can be made to "Muhammad Imran Khan and 4 others v. Haji Muhammad Akhtar and others" (**PLD 2021 Sindh 510**).

10. There is another eventuality where a witness can be declared hostile when he resiles from earlier statement or material part thereof which may also be in the form of joint pleadings or examination-in-

chief. Permission to cross-examine the witness would also be granted where the statement is contrary to the evidence which the witness was expected to give. Reference is made to “*Gulzar Mehmood Khan v. Abdul Waheed*” (2016 CLC 848) and “*Inayat Ullah v. Riaz Ahmad*” (1998 CLC 1148).

11. Needless to say that the right to allow a party to cross-examine a witness of his own is discretionary with the Court and this discretion is to be exercised judiciously. Article 150 of the Qanun-e-Shahadat, Order, 1984, confers on the Court a wide discretion in allowing a party calling a witness to put such questions to him as might be put in cross-examination by the adverse party, where the evidence given by the witness is unfavourable to the party calling him, or is contrary to the evidence which the witness was expected to give. In such a case, the Judge should permit such statements to be tested by cross-examination if the evidence is to be relied upon. Undeniably, a party is bound by the evidence it produces i.e. party producing a witness is bound by whatever statement the witness makes however when an adverse statement is made by a witness the party producing the witness may get the witness declared hostile and seek permission from the Court to cross-examine her for getting rid of her adverse testimony. However, there is one exception that such permission should not be allowed by the Court if it reaches to the conclusion that the object of such cross-examination is to cover up the lacuna in the evidence.

12. In the case in hand, while submitting written statement, recording examination-in-chief as DW-4 and even during cross-examination conducted by plaintiff, the stance of respondent No.8/defendant No.3 remained adverse to the interest of other defendants and DWs. From the facts of the case, it cannot be inferred that the said witness came from petitioner's side because as per record, learned counsel concluded petitioner's oral and documentary evidence on 14.1.2021. However, statement of

respondnent No.8 as DW-4 was recorded on 18.2.2021 and even in presence of written statement of respondent No.8, there was no hope that said witness would depose in favour of petitioner. In these circumstances, it cannot be presumed that declaring said witness hostile and allowing to be cross-examined by a co-defendant would be an attempt to fill the lacuna.

13. For the foregoing facts and reasons, instant petition is allowed and the impugned decisions passed by the Courts below are hereby set aside being illegal and without lawful authority. Learned Trial Court is directed to allow the petitioner to cross-examine defendant No.3/DW-4.

**(Muhammad Sajid Mehmood Sethi)
Judge**

Approved for Reporting

Judge

Waseem