

Form No.HCJD/C-121

**ORDER SHEET**

**IN THE LAHORE HIGH COURT, LAHORE**

**JUDICIAL DEPARTMENT**

W.P. No.81179 of 2022.

Muhammad Zuhaib Ishaq.                      Versus                      SCJ, etc.

S.No.of order/ Proceeding	Date of Order/ Proceeding	Order with signature of Judge, and that of parties' counsel, where necessary
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30.01.2023      Mr. Muhammad Asif Mughal, Advocate for the petitioner.

In the instant petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (‘Constitution’), the petitioner has assailed the order dated 01.11.2022 passed by the learned Senior Civil Judge (Family Division), Jhang dismissing application of the petitioner for cross-examination of the PWs once again on the ground that it slipped from mind of his counsel during earlier cross-examination that suit for dissolution of marriage, maintenance and recovery of dowry articles filed by respondents No.2 to 4 was consolidated with the custody petition filed by the petitioner and his counsel did not cross-examine the said witnesses to the extent of custody petition.

2.      The operative part of the impugned order states as follows:-

*“Perusal of the record reveals that suit filed by the plaintiffs/respondents as well as the petition filed by the petitioner/defendant were consolidated vide order dated 11.09.2021 and consolidated issues were framed. Perusal of the record further reveals that on 18.11.2021, the plaintiffs have produced their evidence and the case was fixed for cross examination upon the PWs. On 19.01.2022, the PWs were cross examined by the learned counsel for the petitioner/defendant and the learned counsel for the plaintiffs closed oral as well as documentary evidence of the plaintiffs and the case was fixed for evidence of the defendant and at this stage, the petitioner/defendant filed the instant application for cross examine the PWs to the extent of custody petition. The reason shown by the defendant that the fact regarding consolidation of custody petition with the suit in hand was slipped from the mind of his*

*counsel due to which he has not cross examined the PWs to the extent of custody petition is not justifiable in the eye of law. After production of evidence by the plaintiffs, the defendant was given opportunity to cross examine the PWs and his counsel cross examined the PWs at reasonable length but now it is not in the interest of justice that the defendant again provided opportunity to cross examine the PWs. Therefore, this application moved on behalf of the petitioner/defendant again to cross examine the PWs is hereby dismissed....”*

3. Learned counsel for the petitioner contends that the impugned order is against facts and based on misapplication of law. He maintains that sufficient authority is vested in this regard in trial court under Section 11(3) of the Family Courts Act, 1964 (‘Act’) which the learned trial court has failed to exercise without any lawful justification.

4. From perusal of copies of the evidence placed on record, it is manifest that the petitioner cross-examined PWs at length including matters relevant to the determination of custody of the minors.

5. No doubt Section 11(3) of the Act provides that the parties or their counsels may further examine, cross-examine or re-examine the witnesses, however, it has been held by the Hon’ble Supreme Court of Pakistan that such provisions are not meant and designed for enabling a party to fill up the omissions in the evidence of witness who has already been examined, due to negligence and lapse of a party, rather the purpose, the nature and the scope of the power available to the Court in that regard is to enable it to seek clarification on any issue or to have a doubt cleared in the statement of a witness which if left outstanding and without which it would be difficult for the Court to take a right decision. Reliance in this regard is placed on judgment of the Hon’ble Supreme Court of

Pakistan in the case of Muhammad Asghar v. Hussain Ahmad and others (PLD 2014 SC 89).

6. Even otherwise, Section 13(3) of the Act must necessarily be construed keeping in view the principle of an equality of arms that lies at the heart of fair trial right guaranteed under Article 10A of the Constitution which reads as follows:

“10A. **Right to fair trial:** 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.

The text of the above fundamental right has been partly adopted from Article 6 of the European Convention on Human Rights. The principle of equality of arms, which is a judicial construct adopted by the European Court of Human Rights, means giving each party a reasonable possibility to present its cause in such conditions as would not put one party in disadvantage to its opponent. In other words, there must be a fair balance between the opportunities afforded to the parties involved in litigation. Reliance in this regard is placed on judgment of this Court in the case of Amar Jeet Singh v. Sant Singh (2022 CLC 6).

7. It has been held by the Hon’ble Supreme Court of Pakistan that the principles of fair trial, as guaranteed by Article 10A of the Constitution, are to be read as an integral part of every sub-constitutional legislative instrument that deals with determination of civil rights and obligations of any person. Reliance in this regard is placed on judgment of the Hon’ble Supreme Court of Pakistan in the case of Naveed Asghar and 2 others v. The State (PLD 2021 SC 600).

8. Proper opportunity having already provided to the petitioner to cross-examine PWs, to allow another opportunity to the petitioner to cross-examine any witness

to fill up lacuna would be akin to place the petitioner at a comparative advantage over his opponent, which would be contrary to the principle of equality of arms and result in violation of Article 10A of the Constitution, therefore, the same could not be allowed.

9. For the foregoing reasons, this writ petition being devoid of any merit, is *dismissed in limine*.

**(RAHEEL KAMRAN)**  
**JUDGE**

\*Asim Shahzad\*

**Approved for reporting.**

**JUDGE**