IN THE SUPREME COURT OF PAKISTAN
(Appellant Jurisdiction)

PRESENT:
Mr. Justice Sardar Tariq Masood
Mr. Justice Sajjad Ali Shah

Civil Petition No. 720/2020
(Against the order dated 31.12.2019 passed by the Islamabad High Court in WP No. 2286 of 2019)

Amjad Khan … *Petitioner(s)*

Versus

Muhammad Irshad (decd) thr. his LRs. …*Respondent(s)*

For the Petitioner(s) : Syed Mastan Ali Zaidi, ASC
Mr. Mehmood A. Sheikh, AOR

For the Respondent(s) : Syed Zulfiqar Abbas Naqvi, ASC
Syed Rifaqat Hussain Shah, AOR

Date of Hearing : 28.09.2020

JUDGMENT

Sajjad Ali Shah, J. The Petitioner seeks leave of this Court to appeal against the judgment of the Islamabad High Court, whereby the High Court, while allowing the constitution petition filed by the Respondents, reversed the order of the learned appellate court granting the Petitioner's application under Order XVI Rule 1 of the Code of Civil Procedure 1908 ("CPC") permitting him to produce three witnesses subject to the cost of Rs.10,000/-.

Facts and Procedural History

2. Briefly, when the Petitioner stepped into the witness box, it transpired that list of witnesses as required under Order XVI Rule 1(1) CPC was not available on record. Consequently, an application was moved seeking permission to produce two marginal witnesses of the agreement, which was the subject-matter of the suit and was duly produced and exhibited by the Petitioner in his evidence, and one

"arbitrator" of the said agreement. This application was based on the grounds that the initial application for producing list of witnesses filed by the Petitioner stood misplaced and that the Petitioner was out of country on account of death of his only son, which is why he could not properly pursue his case. The said application, after hearing, was dismissed by the trial court. The Petitioner then filed an appeal against the order of the trial court, which was allowed by the appellate court subject to cost of Rs.10,000/- on the grounds that the application provided good cause and that such witnesses, if examined, would not cause any surprise to the Respondents as the agreement whose marginal witnesses were sought to be produced is already on record. Against this order, the Respondents filed a constitution petition under Article 199 of the Constitution of Pakistan 1973, which was allowed by the High Court in light of the dictum laid down in the case of *Muhammad Anwar Ali vs. Ilyas Begum* (PLD 2013 SC 255) and the order of the appellate court was reversed.

Submissions of the Parties

3. Learned counsel for the Petitioner contends that the High Court totally failed to consider that the appellate court in its order has discussed in detail the judgment of this Court in the case of *Muhammad Anwar Ali* (*supra*) and its effect and thereafter it concluded that the witnesses sought to be produced were marginal witnesses of the agreement and the arbitrator of the said agreement and the Respondents from the day one knew their role and it could not, by any stretch of imagination, be said to be a surprise for the Respondents. Per counsel once the appellate court has exercised its discretion by coming to the conclusion that the Petitioner has given good cause for filing of application for the production of evidence, then there was no room for the High Court to intervene while exercising the constitutional jurisdiction. It was lastly contended that the Supreme Court in the case of *Muhammad Anwar Ali* (*supra)* has not totally shut the doors of allowing such

request at subsequent stage, therefore, the intervention after the learned appellate court found that the Petitioner has detailed good cause, was un-called for.

4. On the other hand, learned counsel for the Respondents while relying upon the judgment of this Court in the case of *Muhammad Anwar Ali* (*supra)* has vehemently contended that the delay in filing the application under Order XVI Rule 1 CPC clearly indicate that the Petitioner wanted to prolong the proceedings and the law does not allow the production of witnesses as such a belated stage. He further contended that at one breath the Petitioner contends that his application has been misplaced and on the other it is asserted that due to death of his only son, he could not concentrate on the proceedings and was abroad which is contradictory and could not be held good cause. Counsel has further relied on the judgment of this Court in the case of *Haji Zarwar Khan vs. Haji Rehman Bangash* (2016 SCMR 1976) in support of his stance.

5. However, on our query, the learned counsel for the Respondents had no option but to concede that the witnesses sought to be produced are marginal witnesses of the agreement and the arbitrator of the said agreement and that the agreement finds mention in the plaint, has been produced exhibited by the Petitioner herein in his evidence. We have further asked the counsel as to whether the judgment in the case of *Muhammad Anwar Ali (supra),* which is based on an amendment introduced by the Lahore High Court ("LHC") in Order XVI Rule 1 CPC, applies to Federal Capital Area which has its own High Court, but he could not point out any such amendment undertaken or adopted by the Islamabad High Court.

Opinion of the Court

6. We have heard the learned counsel for the parties and have gone through the record as well as the case law cited at bar. The question involved in the

subject petition is as to whether the original text of Order XVI Rule 1 CPC places any embargo on production of a witness by a party whose name does not find mention in the list of witnesses or it pertains to only those witnesses whom a party to the proceeding wants to call through court either to give evidence or to produce documents.

7. Order XVI of the CPC regulates the summoning and attendance of witnesses in order to protect the interests of litigating parties. To this end, its Rule 1 puts an embargo on the right of litigants to summon witnesses in support of their claims. This embargo provides that litigating parties shall submit in court a list of witnesses to be called for attendance within seven days following the framing of issues, and that they shall not be permitted to call any witnesses outside of this list, except with the permission of the court. The purpose of this embargo is to ensure that the litigating parties may prepare their cases with a measure of certainty and know the kind of evidence that is going to be produced, so that they may make necessary preparation for rebuttal and cross-examination and are not taken by any surprise at a belated stage in the proceedings. In this regard, reference can be made to *Muhammad Anwar Ali* (*supra*).

8. Now the primary question to be decided in this case, as mentioned earlier, is as to whether this embargo extends to those witnesses who are not mentioned in the list of witnesses, but are voluntarily produced by the parties without invoking the summoning authority of the court. The answer to this question becomes clear when we examine the overarching scheme of Order XVI. Indeed, a close reading of this Order shows that all of its provisions directly or indirectly relate to summoning of witnesses through the process of court:

i. Rule 1(1) mandates the litigants to file a list of witnesses "*whom they propose to call either to give evidence or to produce documents*" and places an embargo on the parties that disallows them from calling

a witness whose name does not appear in that list except with the permission of the court upon disclosure of a good cause;

ii. Rule 2 provides for the determination and deposit of the expenses of witnesses in the court;

iii. Rule 3 prescribes that the deposited sum shall be paid to the summoned person at the time of service if possible;

iv. Rule 4 provides for the procedure that may be triggered if the deposited sum is insufficient;

v. Rule 5 states that every summons shall specify the time, place and purpose of the required attendance;

vi. Rule 6 provides that a person summoned for producing documents may do so without personal attendance;

vii. Rule 7 empowers the court to ask any person present in court to give evidence or to produce any document then and there in his possession or power;

viii. Rule 8 provides for the mechanism through which summons under Order XVI may be served;

ix. Rule 9 states that the service of summons should be effected in reasonable time;

x. Rule 10, 11 and 12 provide for the procedure and the consequences that may follow such as arrest, attachment or sale of his property if a summoned witness fails to tender attendance in terms of the summons;

xi. Rule 13 then makes the provisions of Order XXI applicable on such attachment and sale;

xii. Rule 14 and 14A make provisions for another category of witnesses, and their expenses, that may be summoned by the court of its own motion;

xiii. Rule 15 imposes a duty on the summoned witness to comply with the terms of the summons;

xiv. Rule 16 empowers the court to ensure that the summoned witness remains in attendance and furnishes security, if required, for attendance at a later date in the suit;

xv. Rule 17 provides that if the witness departs without lawful excuse, s/he may be dealt with in accordance with Rule 10-13;

xvi. Rule 18 also empowers the court to release a person arrested under the preceding provisions upon furnishing reasonable bail or security for appearance at a later date;

xvii. Rule 19 emphatically provides that summons shall not be issued to any person unless s/he resides within Pakistan; and

xviii. Rule 20 gives the court the discretion to pass appropriate orders or judgment against a litigant that refuses to give evidence or produce any document when asked upon to do so by the court.

9. As is evident, none of these provisions mention the category of witnesses that the litigants produce on their own motion. To the contrary, these provisions repeatedly refer to summoning of witnesses and the related matters, meaning thereby that the scope of this Order does not go beyond summoning and

attendance of witnesses through court. In this context, it stands to reason that the aforesaid embargo is also limited to the witnesses who are to be summoned through the court, and does not extend to the witnesses that the parties seek to produce voluntarily without invoking the summoning powers of the court.

10. This interpretation of the embargo also makes sense when considered in relation to its purpose. As discussed earlier, the embargo has been placed to protect litigating parties from a surprise at a belated stage in the proceeding. Voluntary production of witnesses by the parties however does not jeopardize this purpose, because such witnesses either support the claims made in the pleadings and/or the documents mentioned in the list annexed to the plaint under Order VII Rule 14 CPC or produced in court at the first hearing of the suit, i.e. after the framing of issues, under Order XIII Rule 1 CPC. Furthermore, the parties are not allowed to produce any document that has not been brought to the notice of the court in terms of these provisions, except with the permission of the court under Order XIII Rule 2 CPC. In this regard, reference can be made to *Sher Baz Khan vs. The State* (PLD 2003 SC 849) and *Javed Rafat Kkan vs. Messrs. Shabbir Tiles and Ceramics LTD* (PLD 2005 Karachi 1). This means that such witnesses can never depose about anything that the opposing party does not already know, either through the pleadings or through the annexed and submitted documents, foreclosing any chance of taking the latter by surprise. On the other hand, the witnesses which are summoned through the court to give evidence or to produce documents are not bound by the pleadings or the case set up by the parties. They can introduce new elements in the case which may shock the opposing party and adversely impact its case without giving sufficient notice. It is to guard against such surprises by summoned witnesses that the embargo of Order XVI Rule 1 CPC was introduced, not to prevent the parties from producing witnesses present in the court on the day the evidence of the parties is

being recorded whose testimony may be material for a just resolution of the controversy.

11. The distinction between witnesses called through the process of the court and witnesses voluntarily produced by the parties was first examined by a larger bench of the LHC in the case of Ghulam Murtaza in the following terms:

> *"The words "produce" and "call" are not at all synonymous. Word "produce" according to note 1 of the Oxford English Dictionary, Volume VIII, has been described to mean "to bring forward, bring forth or out; to bring into view, to present to view or notice; to offer for inspection or consideration, often used of bringing forward witnesses, as well as evidence or vouchers in a Court of law." The words "witnesses in attendance" used in rule 4 of Order XVIII further clarify the position that witnesses who are brought by the patties in Court have to be examined by the Court. Now comparing the word "call" used in the term of summoning cannot equate with word produce and in attendance used in rules 2 and 4 of Order XVIII, C. P. C. Comparing the terms of art used in Order XVI and Order XVIII it is manifestly clear that the Legislature only placed fetters for the call of witnesses through Court for which a list has to be submitted within the prescribed period under the present rule. Had the Legislature intended to place similar restrictions on the production of witnesses by the parties without the aid of the Court, the word "produce" should have been inserted in between the words "proposed to call" and either to give evidence in rule 1 and in-between the word "to call" and witness used in sub-rule (2) of Order XVI, C.P.C. Having not done so, the intention of the Legislature is, therefore, absolutely clear that the parties are at liberty to bring witnesses along with them on the day when the case is fixed for evidence and the Court cannot refuse recording of their evidence according to rule 4 of the said Order."*[1]

12. The matter thereafter had come up before this Court in the case of Mst. Musarrat Bibi vs. Tariq Mahmood Tariq (1999 SCMR 799), wherein this Court approved the meaning given to the word "call" in Order XVI Rule 1 CPC by the LHC. It appears that this led the LHC to make amendment in Order XVI Rule 1 CPC by inserting the word "or produce" after the word "call" in its sub-rule 1 and sub-rule 2, requiring the litigant to provide a list of witnesses in respect of both kinds of witnesses.[2] The judgment in the case of Muhammad Anwar Ali (*supra*), relied upon by the learned counsel for the Respondents, is based on the amended Order XVI Rule 1

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[1] Underlined by us to supply emphasis.

[2] *Lahore High Court Amdt. Added by Notification No. S.R.O. 330 Rules/XI-Y-26, dated 02.10.2001* (Notified in the Gazette of Punjab, Extra, Part III, dated 28.11.2001).

CPC (though in the year 2018 the LHC has substituted Order XVI Rule 1 CPC to ensure that the list of witnesses contains the names of both kinds of witnesses),[3] which is why it does not draw distinction between the witnesses produced by the parties themselves and the witnesses to be summoned through process of the court. Notwithstanding such factor, it still leaves open for the court to allow the production or summoning of the witnesses at a belated stage upon showing of a good cause. It appears that for want of proper assistance from the bar, neither this distinction nor the facts that the case of *Muhammad Anwar Ali* (*supra*) was based on an amendment introduced only by the LHC and was therefore not available for the other provinces or the Federal Capital Territory, were brought to the notice of the High Court. These aspects need to be properly considered, as this Court is supposed to provide not undue but a fair opportunity to the parties to prove their case. In the instance case, we have asked the learned counsel for the Respondents to demonstrate any prejudice or element of surprise which might be caused to the Respondents, but he could not show us any. He kept on insisting that the Petitioner should not be allowed to produce his witnesses due to the delay, which clearly reflects that the Respondents intend to steal a march upon the Petitioner on account of non-production of the witnesses as their non-production would be fatal to the Petitioner's claim.

13. It should however be noted that the fact that the embargo contained in Order XVI Rule 1 CPC is inapplicable to witnesses that the parties voluntarily produce does not mean that the parties are at liberty to produce such witnesses at any time during the proceeding. As was held in *Ghulam Murtaza vs. Muhammad Ilyas* (PLD 1980 Lahore 495), a careful analysis of the language of Order XVI Rule 1 CPC

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[3] *Lahore High Court Amdt. "Civil Procedure Code (Amendment of First Schedule) 2019" Added by Notification No. 237/Legis/XI-X-26, dated 15.08.2018* (It should be noted that these amendments have not come into force yet, as the same are subject to notification by the Lahore High Court, which is yet to be issued).

read with Order XVIII Rule 2, Rule 4 and Rule 17 CPC shows that such witnesses can only be examined if they are "*produced and are in attendance on the day for recording of evidence*."[4] In this matter, we agree with the interpretation put forward by the LHC and approve the same insofar as the voluntary production of witnesses is concerned.

14. In the end, we would like to observe another aspect which was not brought to the notice of the High Court, namely, that it is by now a settled principle of law that the High Courts must not exercise their constitutional jurisdiction in order to interfere with the discretion exercised by lower courts unless the same suffers from jurisdictional, factual or legal errors. In other words, such interference would be justified in cases where the impugned order has been passed without jurisdiction or is based on misreading or non-reading of evidence, or is not in accordance with the law. If none of these errors is present, the High Courts must not exercise their constitutional jurisdiction to interfere with the findings of lower courts merely because it reached a different conclusion as to the controversy than the latter. In this regard, reference can be made to a collective reading of *Mst. Mobin Fatima vs. Muhammad Yamin* (PLD 2006 SC 214) and *Nadira Shahzad vs. Mubashir Ahmad* (1995 SCMR 1419).

15. The record shows that the learned appellate court allowed the application of the Petitioner by detailing the following reasons:

> "*The Hon'ble Supreme Court in judgment PLD 2013 SC 255 has not stopped the trial courts from receiving the list of witnesses when good/sufficient cause is shown. The petitioner has mentioned in his application that he had to go to [sic] abroad due to death of his son. No doubt petitioner has moved the application for permission to produce the witnesses after lapse of many years, but law also prevent [sic] from non-suiting any party mere [sic] on technical ground. When the petitioner has moved application by mentioning good cause then he should have been given chance to prove his case by producing entire evidence. The learned trial court has knocked out the petitioner mere [sic] on delay in submission of the list of witnesses. The order of the learned court suffers irregularity, hence not sustainable. In view of the above discussion the*

[4] See the case of *Ghulam Murtaza* (*supra*), para 9.

> *revision petition is accepted, and impugned order is set aside. Resultantly application filed by the petitioner u/o XVI rule 1 C.P.C. stands accepted subject to cost of Rs.10,000/- (ten thousands) which shall [sic] before the learned trial court. It is clarified that the petitioner himself shall produce the witnesses mentioned in the list at his own cost.*"

Examining the reasoning of the learned appellate court in light of the preceding discussion reveals that the court thoroughly perused the record and entered cogent reasons for accepting the application. In absence of any infirmity that would have warranted the exercise of constitutional jurisdiction of the High Court, we hold that no case for interference was made out in the discretion exercised by the learned appellate court. Even otherwise, the Petitioner was entitled to produce witnesses on his own motion as of right on the day of recording of evidence even if no application had been made. As such, we direct the trial court to allow the production of two witnesses to the agreement and the arbitrator in terms of the order of the learned appellate court, and the Petitioner shall produce all the witnesses together for recording of the evidence on the same day.

16. The foregoing are the reasons for the Short Order of even date whereby this petition was converted into appeal and allowed. That Order reads as follows:

> "*For reasons to be recorded later, this petition is converted into appeal and allowed. Learned trial Court is directed to decide the suit within three months.*"

Judge

Islamabad, the
28th September, 2020
Approved for reporting
Asad Ullah Khan, LC.

Judge