IN THE HIGH COURT OF SINDH, KARACHI

C.P. No. S-806 of 2019.

Taimoor Mirza……Petitioner

Versus

Maliha Hussain and others……Respondent

Petitioner Taimoor Mirza thorugh M/s Amel Khan Kasi and Waqar Ahmed, advocates.

Respondent No.1 Maliha Hussain through Mr. Rauf Ahmed Butt, advocate.

Date of hearing: 16.07.2019. Date of Judgment: 01.08.2019.

J U D G M E N T

FAHIM AHMED SIDDIQUI, J:- Through the instant constitution petition, the petitioner impugns the order dated 23-05-2019 passed by the learned Additional District Judge-VII, Karachi South in Family Appeal No. 75/2019 as well as order dated 10-04-2019 passed by the learned XXI Family Court, Karachi South in G & W Application No. 981 of 2015. Since, petitioner remained unsuccessful to confront respondent during cross-examination with some digital document as well as bringing them on record before the trial Court as additional evidence; therefore, he filed instant petition.

2. The factual matrix of the case are that the petitioner, who is an educationalist and the owner of 'the International School', entered into marital lock with respondent No. 1 in the year 2005. From the wedlock, the couple was bestowed by Almighty Allah with a daughter namely Rania Mirza (DOB 16-12-2006) and a son namely Saif Ali Mirza (DOB 03-08-2011). The marriage continued for some time but unfortunately it was ended through a divorce, which was finalised with mutual consent of the parties under a certificate dated 17-07-2014, issued by the Chairman Arbitration

Council, Clifton Board. As per the Settlement, an arrangement for visitation right of the petitioner and maintenance of the minors was worked out, while it was also settled that the custody of the minors will remain with respondent No. 1. As per petition, the petitioner is continuously paying Rs. 30,000/- as maintenance/expenses for minors while visitation was also continued in terms of the Settlement, and subsequently an additional amount of Rs. 5000/- was also started to be given as salary of maidservant on the demand of respondent No.1; while educational expenses of the minors were also borne by the petitioner being the students of his own school. Per memo of petition, all of a sudden, respondent No. 1 restrained the minors from meeting with petitioner and then he received a legal notice from her demanding more money against the maintenance of minors and she also switched the school of minors. The petitioner filed aforementioned G & W Application and agitated the matter solely in the interest of minors up to the level of Apex Court and on the direction of the Hon'ble Supreme Court, meetings with minors were restarted and their education were resumed in the school of the petitioner.

3. Nevertheless, the aforementioned G & W Application proceeded further and evidence of the petitioner was recorded; thereafter respondent No. 1 entered into the witness box. At the time of her crossexamination, counsel for the petitioner confronted respondent No. 1 with a printout copy of an email. The counsel for the respondent No. 1

objected upon such confrontation and production of the said email on the ground that the same was not annexed or mentioned at the time of filing of application. Subsequently, the counsel for the petitioner filed an application for production of additional evidence to enable him to bring some documentary evidence on the record for producing and confronting the witness during cross-examination. Such application of the petitioner was dismissed by the learned Family Court and subsequently the appeal was

also declined by the lower Appellate Forum through the impugned orders, as such the instant petition was

filed.

4. Mr. Amel Kasi, learned counsel for the petitioner, while pressing the instant petition has argued at length. He submits that on the objection of the counsel for respondent, he was restrained from confronting an important witness with an email being inadmissible. He submits that the email is admissible as a document and it cannot be objected. According to him, the trial Court has declined to entertain the document i.e. email as additional evidence on the score that it was not the primary evidence. He submits that not only the application of additional evidence was declined but even the review filed by the petitioner was also not entertained by the trial Court. After referring, paragraphs 6 & 7 of the review order, Mr. Kasi submits that the trial Court erred in holding that it was a photocopy but the fact is that it was a printout of the email received by the petitioner from respondent No. 1. He submits that an application for additional documentary evidence was filed on the basis of the observation of the trial Court in the order dated 12-01-2019, but the same was dismissed by the trial Court through the impugned order dated 10-04-2019. He draws attention towards the appeal filed against the said order of the trial Court and submits that the same was also dismissed through another impugned order dated 2305-2019. According to him, law does not prohibit to confront a witness with a document and its production during cross-examination. He further submits that even a party can have a right to produce a document at a subsequent time and even such request can be entertained at the appellate stage. He contends that in spite of nonapplicability of Qanoon-e-Shahadat and CPC; such practice is allowed by the superior Courts since long. In support of his contentions, he relies upon a good number of case laws, which include;

i. Muhammad Ijaz Ahmed Chaudhri v. Mumtaz Ahmed Tarar (2016 SCMR 1).

ii. Anwar Ahmed v. Mst. Nafisa Bano (2005 SCMR 152).

iii. Abdul Aziz v. Gulzar Ahmed (2006 CLC 1237).

iv. Mrs. Nargis v. Muhammad Tariq Moten (SBLR 2012 Sindh 542).

v. Allied Bank Ltd v. Asif Aziz Memon (2006 PLC 448).

vi. Messers Asghar Ali & Bros v. United Bank Ltd. (1987 CLC 504).

vii. Khizar Hayat v. Judge Family Court, Sargodha and another (2018 MLD 1480).

viii. Mst. Talat Shaheen and others v. Muhammad Ibrar and others (2012 MLD 216).

ix. Amjad Ali and another v. Mst. Samara Yasmeen and 2 others (2012 MLD 14).

x. Alamgir Khalid Chughtai v. The State (PLD 2009 Lahore 254)

5. Mr. Rauf Ahmed Butt, advocate representing the respondent No.1, supports the impugned orders overwhelmingly. First of all, he clarifies that his objection before the trial Court was not regarding the admissibility of email but on the ground that it was not annexed or mentioned in the pleadings, as such the same cannot be produced even during cross-examination of a witness. After referring impugned order dated 12-01-2019 passed by the trial Court, Mr. Butt submits that findings and observations of the trial Court are not because of photocopy or printout but due to not filing or producing the same at the proper time. He emphasizes upon the exclusion of the provisions of Qanoon-e-Shahadat and CPC by referring Section 17 of the Family Courts Act, 1964 and submits that in view of such position; question of production of additional evidence does not arise in family cases. According to him, this point has properly adjudicated and elaborately discussed by the two forums below as such the instant petition is not maintainable against the concurrent findings. He submits that the petitioner is actually trying to delay the disposal of the Guardian and Ward proceedings before the Family Court in spite of directions of the

Hon'ble Supreme Court. In this respect, he refers the order passed by the Apex Court in CP No. 465-K of 2016 in which a direction was given to the trial Court for disposal of the G & W case within a period of four months. In the end, he seeks dismissal of the instant petition with directions for early disposal of the case pending before the Family Court.

6. I have heard the arguments advanced and have gone through the available material and reliance placed before me. The controversy between the parties was evolved when the trial Court restrained the petitioner consul from confronting the respondent with an email printout during cross-examination. It was happened when an objection was placed by the learned advocate appearing for respondent before the lower forum. The learned trial judge considered the objection raised by the learned counsel for the respondent as reasonable and disallowed the presentation of such email as well as asking a question regarding the same during cross-examination through an order dated 12-01-2019 on the ground that it was not formally produced with the plaint. Facing such situation, an application for additional evidence was moved, which was also dismissed by the trial Court though impugned order after holding that the email is a photocopy, as such it is not a primary evidence. The appellate court also not entertained such request of the petitioner through another impugned order referred in the initial part of this judgment.

7. The whole controversy between the parties rests on this vital issue that which documents can be confronted during crossexamination and whether email is admissible in evidence. No doubt, provisions of the Qanoon-e-Shahadat Order shall not apply to a proceeding before the Family Court but it does not mean that the basic principle of evidence will be overlooked at the time of recording evidence. Although, at the time of recording evidence, it is not necessary for a Family Court to follow the

procedure laid down in different articles of the Qanoon-e-Shahadat but at the same time it is necessary that the basic rules laid down under the jurisprudence of evidence should not be overlooked. The non-applicability of Qanoon-eShahadat and Civil Procedure Code in family courts proceedings as provided under Section 17 is not amounting to a bar on family courts but its purpose is to give a freedom to family courts to adopt any procedure which is not expressly barred or prohibited by law. In this respect reliance may be placed upon the case reported as Amjad Ali and another v. Mst. Samara Yasmeen and 2 others (2012 MLD 14), wherein the learned writer judge of Lahore High Court has also quoted several celebrated judgements on the same issue, he speaks as:

> *"However, there is ample authority for the view that a Family Court can, for the purpose of settlement of matrimonial disputes, employ or adopt any procedure which is not expressly barred or prohibited by law. According to Muhammad Azam v. Muhammad Iqbal (PLD 1984 Supreme Court 95), a Family Court has been given a real inquisitorial jurisdiction by introduction of special procedure including an obligatory effort to discover possibilities of amicable settlement. A Family Court can, thus, follow a flexible and liberal procedure while proceeding with a family suit and can exercise all such powers as are not prohibited by the West Pakistan Family Courts Act, 1964. In Ejaz Mahmood v. Mst. Humaira and another (1983 CLC 3305) and Mirza Shahid Baig v. Lubna Riaz and 2 others (2004 CLC 1545), it was observed that the provisions of C.P.C. are not applicable to a family suit but the Family Judge can adopt any procedure which is not expressly barred by the Act and which is necessary to prevent the course of justice being deflected. Again in Abdul Majid v. Judge Family Court, Karore Pacca and 2 others (2003 YLR 884), it was held that a Family Court has to regulate its own procedure and can apply any procedure not prohibited by law. In this context, it may be added that although the provisions of the Code of Civil Procedure, 1908 and the Qanun-e-Shahadat, 1984, would not be applicable in stricto senso but the principles embodied therein sans technicalities could be applied by the Family Court to advance the ends of justice provided there is no conflict or inconsistency with the provisions of the West Pakistan Family Courts Act, 1964. In support, reference can be made to Akhtar Ali Said Bcha v. Mst. Naheed Bibi (PLD 2003 Peshawar 63) wherein it was observed that "The purpose of enacting Family Courts Act is to frustrate the technicalities for the purpose of justice between the parties in the shortest possible manner. All that the Family Courts Act has done is that it has changed the forum, altered the method of trial and empowered the Court to grant better remedies. The provisions of C.P.C. are not applicable in stricto senso to proceedings before the*

Family Court by virtue of section 17 of the West Pakistan Family Courts Act, 1964. The purpose of enacting special law regarding the family disputes is for the purpose of advancement of justice and to avoid technicalities. It is settled proposition of law that Judge Family Court is competent to regulate its own proceedings as the West Pakistan Family Courts Act, 1964, does not make provision for every eventuality and unforeseen circumstance."

8. From the above citation, it is clear that although provisions of Qanoon-e-Shahadat are not applicable in family courts proceedings but the principle laid down in the Qanoon-e-Shahadat can be followed. Hence, it is necessary for a family court to follow the principle or jurisprudence of evidence at the time of recording evidence. It is the jurisprudence of the law of evidence that cross-examination is a litmus test of the truthfulness of the statement made by a witness on oath in examination-in-chief, as such the objects of cross-examination are:

a) to demolish or decline the evidentiary value of the witness by his adversary;

b) to extract the true facts in favour of the cross-examining lawyer's client from the mouth of the witness of the opponent party;

c) Impeaching the trustworthiness and integrity of witness to show he is unworthy of belief; and

d) to shake his credibility by injuring his character

9. It is now clear that jurisprudence of law allows that the questions to be addressed in the course of cross-examination as to test the veracity of witness and to discover who he is and what is his position in life. The principles laid down for examination-in-chief and crossexamination are altogether different. Since impeachment of a witness is required; therefore, sufficient liberty has been provided to a party conducting cross-examination like asking of leading question and confronting the previous statements of the witness whether the same pertains to some other proceeding or event, no doubt subject to relevancy with the issue. It is worth noting that the word 'examinationin-chief' and 'cross-examination' are not distinctly mentioned in

the Family Court Rules but the Family Courts used to follow the same, meaning thereby that though the provisions of Qanoon-e-Shahadat are not applicable but the basic principle of evidence are to be considered by a Family Courts during recording of evidence, as such the same cannot be overlooked or avoided under the garb of non-applicability of Qanoon-e-Shahadat Order. Nevertheless, as it is a settled principle of cross-examination that a witness may be confronted with his or her previous statement. Email or other digital communication of a witness comes under the definition of previous statement, as such the witness may be suitably confronted during cross-examination with such digital document. After inception of electronic mail and in the era of social media, the mode of communication has been amazingly changed, and the courts should not be oblivion of the abundance of flow of communication and information through these mediums. If it is established that any information communicated by a person from his account through email, Facebook, WhatsApp, twitter etc., the same may conveniently be referred during cross-examination. It is my considered view that even the courts can use electronic mail and WhatsApp for communication to a party in respect of service etc., as these are the medium from which the delivery of message and its perusal by the party can easily be established. Thus any email written by a witness or addressed to him and received in his inbox is his document and the same can be used to confront him by just referring it or producing it if attention of witness is required to draw toward certain portion of the document. Even any other sorts of digital documents in the shape of messages, photographs or movie clips can be referred and used during cross-examination of a witness, provided it is established that the same had been shared by him on social media from his personal account.

10. As far as, the annexing of documents with the pleadings is concerned that is a legal requirement but its purpose is altogether different. Such documents may be used during cross examination but the intention of the

legislature to annex them or refer in a list is entirely different. In Section 7(3)(i), the clause 'a plaintiff sues or relies upon a document' indicates that only those documents are required to be produced by the plaintiff on which his claim rests, so that other side may comprehend his claim properly and tailor his defence. Similarly, the defendant in a family suit has to disclose all the documents, relied by him but it does not mean that the cross-examination of a witness is restricted to those documents only. As per settled principle of evidence, if a witness speaks in a different tone during examination in chief or cross-examination, his adversary has a full right to confront him either from his previous statement or his own document. I am of the view that it is least necessary to file an application for additional evidence regarding some documents intending to produce and confront a witness during cross-examination, if those documents were originated or initiated by him. The trial Court has discarded the production of email considering the same as secondary evidence by holding that it is just a photocopy or printout. I am of the view that during cross-examination, if email is referred as a previous statement of the witness, its production is not necessary. However, if the lawyer conducting cross-examination is having an intention to draw attention of the witness towards the content or some portion of the email then its production is necessary during cross-examination of the witness as exhibit and marking of the portion of email so confronted. It is rational that the learned trial judge was sceptical regarding admissibility of email as evidence, if he has not faced such situation before. In fact, email is a form of documentary evidence and the same can be admitted as evidence in court in the same way as other forms of documentary evidence. However, the reliability of such email will always be a question and the same will be subject to scrutiny. An email can be produced as a document in shape of hard-copy i.e. printout, but one may not consider an email or other form of electronic text message as a ‘smoking gun’ in favour of his case. This can be a particular issue and measures

should be taken to protect the integrity and authenticity of email by digital signature (if available) and encryption etc. and insuring that the same should be available in his inbox or transferred to some other mailbox in his email account so that its genuineness can be established in case of denial. The major evidentiary issue for a trial judge arises in respect of a private digital communication to reach at a conclusion that the texts of electronic document were genuinely written by the other party or not. Besides getting some technical and expert assistance, a judge can overcome this problem of authentication of an email or text message through different ways, which are;

i) the adverse party admits that the texts were written by him.

ii) a witness may come in witness box and say that he saw the message created.

iii) characteristic of the message itself speaks that it was created by the author for whom it is claimed as author of the same.

iv) circumstances of the case proof that it was created as claimed.

v) a 'reply authentication' specially for email, i.e. an electronic reply showing both parties email addresses and text messages clearly indicating that the same was sent in response to the text message that was initially sent.

11. Nevertheless, reliability of email or other electronically generated documents may be subject to attack but a party cannot be restrained to present it in the Court as a documentary evidence. As far as confrontation to a witness during cross-examination is concerned, in view of the above discussion, the same is also allowed if emails or other digital documents are generated or originated by the witness, who is facing cross-examination or on his behalf. The ultimate outcome of the above discussion is that the petitioner may confront the respondent with her previous statement either oral or in shape of document including digital document like email or any other form of electronically generated or created document communicated through the medium of internet. With these observations, the instant petition

is allowed and the impugned orders are set aside. The petitioner may confront the respondent in the witness box during cross-examination with all the digitally created and communicated documents by her through email or social media subject to relevancy of the same. The learned Family Court may form its opinion regarding the admissibility of the same on the parameters mentioned above. Petition allowed.

Dated: _____ J U D G E