**Stereo.HCJDA 38.**

**Judgment Sheet**

# IN THE LAHORE HIGH COURT LAHORE
# JUDICIAL DEPARTMENT

. . . .

## Writ Petition No.2603 of 2015.

**WAHAB AHMAD**.

**VS**

**Mst. SHAISTA JABIN & another**.

## JUDGMENT

Date of hearing: 02.02.2015
Petitioner by: Ch. Muhammad Ismail, Advocate.

**MIRZA VIQAS RAUF, J.** The petitioner, through instant petition, assails the vires of order dated 22nd of December, 2014 passed by the learned Judge Family Court, Lahore, whereby the application filed by the respondent No.1 under section 7 of The Family Courts Act, 1964 for including the names of witnesses in the list of witnesses and for recording their evidence was allowed.

**2.** Precisely, the facts necessary for the adjudication of instant petition are that the respondent No.1 filed two separate suits, one for recovery of maintenance and restitution of conjugal rights and the other for recovery of dowry articles against the petitioner before the learned Judge Family Court, Lahore. The petitioner, being the defendant, resisted the said suits and submitted his written statements, whereby the assertions contained in the plaints were controverted.

**3.** The learned Judge Family Court, vide order dated 27th of January, 2014 consolidated both the said suits and thereafter framed the consolidated issues. After framing of issues, the respondent No.1 led her evidence and when the same was under process, she moved an application under section 7 of The Family Courts Act, 1964 for incorporating the names of Tariq Saeed and Muhammad Sadiq as her witnesses in the list of witnesses and recording of their evidence as such. The petitioner resisted the said application and filed his written reply. The learned Judge Family Court vide its order dated 22nd of December, 2014 allowed the said application subject to payment of costs of Rs.1,000/-.

**4.** Learned counsel for the petitioner contended that the respondent No.1 since has not mentioned the names of intended witnesses in the list appended with the plaint so, she is precluded to file any such application. He maintained that the learned Judge Family Court, while allowing the said application has erred in law. Learned counsel submitted that in terms of section 7 of The Family Courts Act, 1964, no such application is maintainable. It is argued that when the respondent No.1 initially did not incorporate the names of intended witnesses in the list, she is precluded to either incorporate the said names in the list or to apply for recording of their evidence. In support of his contentions, learned counsel relied upon the case of ***MUHAMMAD ANWAR AND OTHERS versus MST. ILYAS BEGUM AND OTHERS (NLR 2013 Civil 247***).

**5.** I have heard the learned counsel for the petitioner and perused the record.

**6.** The moot question before this Court is that if once a plaintiff fails to incorporate the name of any witness in the list of witnesses appended with the plaint, whether this omission will operate as a complete bar against the plaintiff to apply for the incorporation of names of witnesses and for recording of their evidence later on.

**7.** Before dilating upon the proposition in question, it would be advantageous to go through the relevant provision of law which is applicable to the present case and for the said purpose, section 7 of The Family Courts Act, 1964 would be relevant which is reproduced below:

> "**7. Institution of suits**.—(1) Every suit before a Family Court shall be instituted by the presentation of a plaint or in such other manner and in such Court as may be prescribed.
>
> (2) The plaint shall contain all [material] facts relating to the dispute and shall contain a Schedule giving the number of witnesses intended to be produced in support of the plaint, the names and addresses of the witnesses and brief summary of the facts to which they would depose:
>
> Provided [further] that the parties may, with the permission of the Court, call any witness at any later stage, if the Court considers such evidence expedient in the interest of justice.
>
> [Provided that a plaint for dissolution of marriage may contain all claims relating to dowry, maintenance, dower, personal property and belongings of wife, custody of children and visitation rights of parents to meet their children." and]
>
> [(3) (i) Where a plaintiff sues or relies upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time, deliver the document or a copy thereof to be filed with the plaint.
>
> (ii) Where he relies on any other document, not in his possession or power, as evidence in support of his claim, he shall enter such documents in a list to be appended to the plaint ["giving reasons of relevancy of these documents to the claim in the plaint.]

> (4) The plaint shall be accompanied by as many duplicate copies thereof including the Schedule and the lists of documents referred to in sub-section (3), as there are defendants in the suit, for service upon the defendants."

**8.** Bare reading of above said provision clearly postulates that it does not contain any inflexibility to cater such a situation as proviso to the sub section 2 clearly bestows an authority upon the Court that if a party is desirous to call any witness at any later stage, he can do so with the permission of the Court if the Court considers such evidence expedient in the interest of justice. Section 15 of the Act, ibid also vests certain powers upon the Family Court to summon witnesses for appearance or leading evidence or production of any document. Above all there are no consequences provided under section 7 of The Family Courts Act, 1964 in case of non-compliance of the said provision, which brings it out of the mandatory nature.

**9.** The judgment cited by the learned counsel for the petitioner is of no help to him as the principles laid down in the said judgment are based on the analogy contained in the order XVI of The Civil Procedure Code (V of 1908). Section 17 of The Family Courts Act, 1964 specifically states that the provisions of Civil Procedure Code (V of 1908) are not applicable to the proceedings before the Family Court. For ready reference, the same is reproduced below:-

> "**17. Provisions of Evidence Act and Code of Civil Procedure not to apply. (1)** Save as otherwise expressly provided by or under this Act, the provisions of the [Qanun-e-Shahadat, 1984 (P.O. No. 10 of 1984)] and the Code of Civil Procedure, 1908 [except sections 10 and 11] shall not apply to proceedings before any Family Court, [in respect of Part I of Schedule]

> **(2)** Section 8 to 11 of the Oaths Act, 1873, shall apply to all proceedings before the Family Courts."

**10.** Even otherwise, the command contained in order XVI of The Civil Procedure Code, 1908 is entirely different from the mandate given under section 7 of The Family Courts Act, 1964 as in the case of former provision of law, there are three pre-conditions which are to be fulfilled before seeking permission to call or produce the witness other than those contained in the list. Firstly, the permission of Court is necessary for the said purpose, secondly the party intending to move for the same has to show good cause for the said omission and thirdly in case of grant of such permission, the Court has to record reasons for so doing. Whereas in the latter case, it is left at the judicial discretion of the concerned Court to decide the said issue on the sole consideration that such evidence is expedient in the interest of justice.

**11.** This Court, while dealing with somewhat similar issue in the case of ***Malik IRFAN AHMED GHEBA versus ZUBI IRFAN and 4 others (2004 M L D 635)*** held that:-

> "The proviso of subsection (2) of the section 7 clearly provide that the parties may with permission of the court call any witness at any later stage if the Court considered such evidence expedient in the interest of justice. Addition of word "further" in proviso of section 7(2) by Ordinance VL of 2002 on 1-10-2002 manifest the intention of legislature to grant a permission liberly, if, the Court considers such evidence expedient and essential for a just decision.
>
> 8. Section 11(2) places bar on issuance of summons for the appearance of witness, unless a party intimates the Court within three days of the framing of issue of its desire to summon a witness through court. It is not couched in

mandatory language and will not be treated as mandatory one in the absence of consequence for its non-compliance."

**12.** Similarly, the above principles were reiterated in the case of ***AMJAD JAVED versus JFC and others (2005 MLD 1776)***. There is yet another judgment of this Court on the same point in the case of ***MUHAMMAD AKRAM versus JUDGE, FAMILY COURT and others (2009 CLC 269)***. The relevant extract from the said judgment is reproduced herein below:-

"The provisions of subsection (2) specifically lay down that the parties may, with the permission of the Court call any witness at any later stage if the Court considers such expedient in the interest of justice. By virtue of these provisions the Court is competent to allow a party to include the name of desired witness in the list in accordance with subsection (2) of section 7 (ibid). The witnesses so included can be produced by the party, though it cannot get the summons issued if within three days of the framing of the issues it has not intimated the Court its desire that a witness may be summoned through the Court.

5. When confronted with the provisions of section 7 and 11 of the Family Courts Act, 1964 the learned counsel for the petitioner stated that the petitioner would like to include the names of the witnesses in the list under section (2) of section 7 and would not seek the summoning of such witnesses through the Court but would himself produce them in evidence. He submitted that the necessity for including the names in the list of witnesses is that without including the names in that list the petitioner cannot even call the witnesses in the witness box at his own responsibility."

**13.** The Family Courts Act, 1964 provides speedy mechanism for the resolution of issues arising from the matrimonial relations. By way of said Act, Family Courts have been absolved from the procedural rigors provided under ordinary procedural codes e.g. The Civil Procedure Code, 1908. This was the reason that by virtue of section

17 of The Family Courts Act, 1964 all the provisions of The Civil Procedure Code were exempted from the applicability to the proceedings before the Family Court except its section 10 and 11. The intent of legislature was to provide the speedy justice to all the concerned by simplifying the procedure for resolution of family disputes, thus the Family Court for the purpose of advancement of justice can adopt any of the mode which is not specifically prohibited under the law i.e. The Family Courts Act, 1964 and the rules framed thereunder.

**14.** The order under challenge is even otherwise an interlocutory and interim order and unless the same suffers with patent illegally, the writ jurisdiction cannot be exercised to set the same at naught. The impugned order is apparently passed for the advancement of ends of justice and when there is no prejudice to the case of either side, the same cannot be interfered with in exercise of constitutional jurisdiction. Resultantly, the instant petition fails and is **dismissed in limine** with no order as to costs.

**(MIRZA VIQAS RAUF)**
**JUDGE**

***Mahtab***

***APPROVED FOR REPORTING.***

**(MIRZA VIQAS RAUF)**
**JUDGE**