

2020 C L C 1910

[Lahore]

Before Jawad Hassan, J

Mst. MOTIA MASOOD through Special Attorney----Petitioner

Versus

MUHAMMAD YASIR and another----Respondents

W.P. No.21296 of 2012, decided on 6th April, 2017.

Family Courts Act (XXXV of 1964)---

---S.5, Sched---Suit for recovery of dowry articles---Cross-examination, right of---Scope---Family Court closed right of cross-examination of plaintiff upon the witnesses of defendant--Contention of plaintiff was that sufficient opportunities had not been granted for cross-examination upon the witnesses of defendant---Validity---Family Court had not granted sufficient opportunities to the plaintiff to cross-examine the witnesses of defendant---Sixteen opportunities had been afforded to the defendant to produce his evidence who had produced his evidence only on four dates of hearing---Family Court was not justified in closing the right of cross-examination of plaintiff, in circumstances---Right to cross-examination was a valuable right of the party and it was meant for discovering truth---No one should be deprived from the said right lightly---Opportunity to cross-examine a witness must be real, fair and reasonable---Rules of procedure were meant to advance justice and to preserve right of litigants---High Court granted one opportunity to the plaintiff to cross-examine the defendant and his witnesses subject to payment of costs---Impugned order passed by the Trial Court was set aside and Family Court was directed to provide one opportunity to the plaintiff to cross-examine the defendant and his witnesses---Constitutional petition was allowed, in circumstances.

Messrs Ijaz Nizam v. NIB Bank and others 2017 CLD 361 rel.

Mahmood Tahir Chaudhry for Petitioner.

Nemo. for Respondents.

ORDER

JAWAD HASSAN, J.---Through this petition, the Petitioner has called in question order dated 10.07.2012 passed by learned Judge Family Court, Nankana Sahib, whereby the right of the Petitioner to cross-examine the witnesses of Respondent No.1/Defendant was closed.

2. Briefly, the facts for the disposal of this constitutional petition are that Respondent No.1 filed a suit for recovery of dowry articles or its price Rs.9,39,225/- and also for dissolution of marriage. The said suit was contested by the Petitioner by filing a written statement on 26.11.2010. On 7.12.2010, the pre-trial conciliation failed and consequently suit for dissolution of marriage of the Petitioner was decreed. Out of divergent pleadings of parties issues were framed. In support of her claim, the Petitioner produced two witnesses namely Masood Ahmad (PW-1) and Muhammad Zahid (PW-2) for recording their oral evidence and exhibited documents Exh-P/1 to Exh.P-36 and Mark A&B as documentary evidence. On 21.2.2012, the case was first time fixed for the evidence of the defendant. On the other hand, the Respondent No.1/Defendant produced Muhammad Yasir (DW-1), Sheikh Asif Mahmood (DW-2) and Allah Tawakal (DW-3). On 6.3.2012, affidavits of the witnesses were submitted and thereafter on 24.4.2012, the witnesses of the Respondent/Defendant appeared first time for cross examination before the learned trial court but due to leave of the learned Presiding Officer, the cross-examination could not be conducted. Thereafter on 26.6.2012 the witnesses of the defendant put their appearance at 12.05 pm and due to shortage of time cross-examination could not be conducted. On 10.07.2012 the witnesses of the defendant put their appearance at 10.30 am on third call before the learned trial Court. The right of cross-examination of the Petitioner/Plaintiff on the witnesses of the Respondent/Defendant was closed on 10.7.2012.

3. The grievance voiced through this petition is that the learned trial Court without waiting the counsel for the Petitioner/plaintiff and the end of time of Court closed the right of cross-examination of the Petitioner/Plaintiff on the witnesses of the Defendant. It is further contended that Respondent No.1 was granted 16 opportunities to produce his evidence but only on four dates of hearing the evidence was produced. The counsel for the Petitioner/Plaintiff never defaulted. He sought only one adjournment for examination of the affidavits of the witnesses. He argued that impugned order is result of non-application of judicious mind, against the spirit of justice and rights of the Petitioner/Plaintiff, hence is liable to be set aside.

4. On the other hand, counsel for the Respondent/Defendant despite publication his name in the cause list has not entered appearance today. Order sheet reveals that 12.12.2014, 27.03.2017 and 3.4.2017, the counsel for the defendant was not present therefore, he is proceeded against ex-parte.

3. (sic) Arguments have been heard and record perused.

4(sic) It is reflected from perusal of record that before closing the right of cross-examination on the witnesses of the Respondent/defendant, no sufficient opportunities were not granted to the Petitioner. Record reveals that 16 opportunities were granted to the Respondent No.1 to produce his evidence but only four dates of hearing the evidence was produced, therefore, the learned trial court was not justified in closing the right of cross-examination of the Petitioner Right to cross-examine is a valuable right of the party and is a mean of discovering truth of which he should not be lightly deprived. The opportunity to cross-examine a witness contemplated by law must be real, fair and reasonable. Rules of procedure meant to advance justice and to preserve right of litigants and these are not meant

to entrap them into blind corner so as to frustrate the purpose of law and justice. Reliance is placed on the recent judgment of this Court titled Messrs Ijaz Nizam v. NIB Bank and others (2017 CLD 361), wherein it has been held as under:-

"In plethora of judgments, the Hon'ble Supreme Court of Pakistan has held that right to close the evidence under Order XVII, Rule 3, C.P.C. shall not be exercised unless various opportunities have been granted to the parties who have failed to produce evidence. Reliance in this respect is placed upon Sheikh Khurshid Mehbood Alam v. Mirza Hashim Baig (2012 SCMR 361), Zahoor Ahmed v. Mehra (1999 SCMR 105); Muhammad Arshad v. Muhammad Jahanzeb Khan (2008 SCMR 1335).

It has also been held in Ijaz Nizam's case (supra) as under:-

"Similarly in Ally Brothers and Company v. Federation of Pakistan, 2009 YLR 982, the Lahore High Court in order passed by Mian Saqib Nisar, J held that impugned order to close the right to cross-examine has been passed in, undue haste, which obviously has violated and curtailed the petitioner's most valuable right of cross-examination, therefore, such order cannot sustain. Reliance is placed on Kashid Ali Khan and another v. Sher Jan Muhammad and another, 2006 MLD 1447 and Lyallpur Cotton Mills v. Authority under Payment of Wages Act, Faisalabad, 1985 PLC 569."

Since the Petitioner/Plaintiff was not awarded ample opportunities to cross-examine the witnesses of the Respondent No.1, therefore, in the interest of justice and to decide the case on merits, one more opportunity is granted to the Petitioner to cross-examine the Respondent No.1 / Defendant and his witnesses subject to payment of costs to be paid to the Respondent No.2.

In view of the above, this writ petition is allowed and impugned order dated 10.07.2012 is set aside subject to payment of costs of Rs.5000/- to be paid to the Respondent No.1/Defendant and learned trial court is directed to provide one (1) opportunity to the Petitioner/Plaintiff to cross-examine the Petitioner/Plaintiff and her witnesses in the terms mentioned above.

ZC/M-89/L

Petition allowed.