

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL

MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

CRIMINAL PETITION NO. 1091 OF 2021

(On appeal against the judgment dated 14.06.2021
passed by the Peshawar High Court, Peshawar in Cr.
Revision No. 307-P/2019)

Sher Hassan and others

... Petitioners

Versus

Gul Hassan Khan and others

...Respondent(s)

For the Petitioners: Mr. Altaf Khan, ASC

For Respondents (1 & 3): Mr. Imtiaz Ali, ASC

Date of Hearing: 06.01.2022

ORDER

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Through the instant petition under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973, the petitioners have called in question the vires of the judgment dated 14.06.2021 passed by the learned Peshawar High Court, Peshawar whereby the Criminal Revision filed by the petitioners was dismissed and the orders of the learned Courts below were upheld by which the right of the petitioners to cross-examine PWs 3-5 was struck down.

2. Briefly stated the facts of the matter are that the respondents filed a complaint against the petitioners under Section 3 of Illegal Dispossession Act, 2005 wherein it was alleged that the petitioners have illegally dispossessed them from the property measuring 29 marlas, situated near Government College, Peshawar. Pursuant to the report of the SHO, the learned Trial Court dismissed the complaint vide order dated 25.03.2014. The respondents filed Writ Petition No. 1419-P/2014 against the said order, which was allowed vide order dated 16.03.2017 and the case was remanded back to the learned Trial Court to proceed with the complaint after affording an opportunity of hearing to both the parties. Thereafter, a formal charge

was framed against the petitioners and the respondents were directed to adduce their evidence. During the course of trial, statements of PW-1 and PW-2 were recorded whereas the examination-in-chief of PWs 3 to PW-5 was recorded. However, these three witnesses could not be cross-examined by the petitioners and ultimately their right of cross-examination was struck down vide order dated 25.06.2019 passed by the learned Trial Court. Petitioners then filed review petition but it stood dismissed vide order dated 09.12.2019. Being aggrieved, the petitioners filed Civil Revision before the learned Peshawar High Court but it also met the same fate vide impugned judgment. Hence, this petition seeking leave to appeal.

3. Learned counsel for the petitioners contends that the absence of the counsel for the petitioners before the Trial Court to cross-examine PWs 3-5 was due to his professional engagements and the same was not deliberate or intentional. Contends that there is no concept of striking down the right of cross-examination in the criminal jurisprudence and not affording the petitioners the opportunity to cross-examine PWs 3-5 would amount to condemning them unheard and if the petitioners are allowed to cross-examine the said witnesses, the Trial Court would be in a better position to decide the case on merits.

4. On the other hand, learned counsel for the respondents has defended the impugned judgment by contending that on eight occasions the petitioners' counsel was not present before the Trial Court, therefore, keeping in view their conduct their right to cross-examine PWs 3-5 was rightly struck down by the courts below.

5. We have heard the learned counsel for the parties at some length and have gone through the case file.

The phrase "defence struck off" or "defence struck out" is not unknown in the sphere of civil law and indeed it finds a place in Order XI Rule 21 of the Code of Civil Procedure. However, this concept is alien to the proceedings under the Code of Criminal Procedure. However, at this stage, we do not want to delve into detail of this aspect of the matter as to whether the proceedings under the Illegal Dispossession Act, 2005 are in the nature of a complaint and are different from the proceedings carried out pursuant to registration of FIR. Article 10A of the Constitution of Islamic Republic of Pakistan,

1973 speaks about right of fair trial and due process both in civil as also in criminal proceedings. Thus the right to fair trial is a fundamental and Constitutional right belonging to every citizen of Pakistan. While deciding a criminal lis, the recording of evidence including the right of cross-examination of the witnesses, hearing of arguments and a reasoned judgment are the essential attributes of criminal justice system based on the Constitutional command. According to Merriam-Webster, the word 'evidence' means "material that is presented to a court of law to help find the truth about something". The statements of witnesses and cross-examination is a vital part of that material, which form part of evidence, therefore, in absence of such an important piece of evidence, the Court could not come to a just and fair conclusion. In Muhammad Bashir Vs. Rukhsar (PLD 2020 SC 334) this Court has held that "right to cross-examine is the right of the adverse party which right he/she may forego but one which he/she cannot be deprived of. Criminal trial of an accused must be conducted with utmost fairness. Fundamental right of fair trial which the Constitution guaranteed is violated if any accused is deprived of the opportunity to cross-examine a witness deposing against him." Even if we deny the right of cross-examination to the petitioners, in appeal the matter would again be remanded and, therefore, would further linger on the proceedings. It would, therefore, be in the interest of justice, if the petitioners are given the opportunity to cross-examine PWs 3-5 and by doing this no prejudice would be caused to the respondents. Consequently, we convert this petition into appeal, allow it and set aside the impugned judgment. The learned Trial Court is directed to afford an opportunity to cross-examine PWs 3-5 to the petitioners and complete this exercise within a period of one month of the next date of hearing before it.

JUDGE

JUDGE

Islamabad, the
6th of January, 2022
Approved For Reporting
Khuram