

**THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

Constitutional Petition No.S- 620 of 2025

Present: Justice Jawad Akbar Sarwana

Petitioners : Ali Nawaz s/o Abdullah Kolachi and 2 others through
Mr. Sher Dil Ansari, Advocate.

Respondents : Allah Bux s/o Luqman Khaskheli and 9 others.
Nemo.

Date of hearing : 13.11.2025.

Date of Order : 13.11.2025.

Date of reasons : 17.10.2026.

ORDER

JAWAD AKBAR SARWANA, J: Petitioner is aggrieved by order dated 04.10.2025 passed by the learned 1st ADJ Tando Muhammad Khan wherein he set aside the order passed by the learned 2nd Senior Civil Judge, Tando Muhammad Khan in the trial proceedings. The trial Court had passed orders dated 02.05.2025, allowing the petitioners / plaintiffs to record the evidence by way of affidavit in evidence. Counsel submits that this would have save the time of the Court as well as the parties. Further less preparation time would be consumed on the part of the witnesses of the plaintiffs.

2. Heard counsel. I have read the impugned order dated 04.10.2025 wherein the learned 1st ADJ has found that in the light of provisions of Order 18 Rule 4 CPC and Order 19 Rule 1 and 2 CPC read in the light of PLD 1968 Lahore 423, preference is to be given for recording of evidence viva voce as opposed to by way of filing affidavit in evidence.

3. It is a trite proposition that recording of evidence allows the Court to see the demeanor of the witness and such opportunity becomes available not only during cross examination but also at the time of examination in chief of the witness. Therefore, the trial Court in terms of ascertaining the veracity of the facts brought on record has the opportunity when evidence is recorded by viva voce to consider the demeanor of the witness. Further the Qanoon-e-Shahadat as framed also assumes that evidence will be recorded viva voce. Therefore, preference to the mode of recording examination-in-chief must be given to the expressed provisions of law unless such provision allows the Court for reasons to be recorded to exercise its discretion otherwise.

3. With regard to counsel's contention that recording of evidence by affidavit will save time and require less preparation for the witnesses that is no ground to segway from expressed *modus operandi* of recording evidence, i.e. viva voce. No doubt time may be saved during examination in chief by affidavit in evidence such practice may be permissible when it is by consent of the parties and the Court's discretion. Recording of evidence, i.e. examination-in-chief by way of affidavit in evidence is not as a matter of right. When parties are not at idem the default position must be to adhere in the first instance to the procedure prescribed under the Civil Procedure Code. Therefore, when the parties agreed to record evidence by way of affidavit and the Court in its discretion is satisfied such procedure will not harm/hurt/impact the substantive rights of either party and further will not come in the way of adjudication of the suit, the Court exercising its discretion may allow the parties to record evidence by way of affidavit in evidence. In the present case although the plaintiff had expressed an intention to depose evidence by way of filing affidavit in evidence yet the opposing counsel resisted the same. Therefore, the trial Court ought to have proceeded with the matter in accordance with the provisions of CPC and ordered recording of evidence

viva voce. The appellate Court rightly directed parties to record evidence by final oral mode of evidence, i.e. viva voce.

4. Given the above reasons, I do not find the impugned order to be “without lawful authority” and / or “is of no legal effect”. The same does not merit any interference. Parties are directed to record evidence viva voce. Accordingly, the petition is dismissed alongwith pending applications.

JUDGE

Tufail