

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 941 / 2013

Date	Order with signature of Judge
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Hearing of CMA No. 1744 of 2019

Mr. Danish Nayyar, advocate for the Plaintiff.
Mr. Rasheed Mughal, advocate for Plaintiff No1(b)
Mr. Haseeb Jamali, advocate for the defendant.

Date of hearing: 30.01.2020

Arshad Hussain Khan J. Through this application (CMA 1744 of 2019), under Section 151 CPC, Ms. Nazra Huda, newly impleaded Plaintiff No.1(b) seeks that her statement of fact [through her accompany affidavit] may be recorded /taken into consideration while adjudicating upon instant suit as well as other ancillary proceedings in the matter.

2. It has been stated in the affidavit in support of the instant application that the Applicant [Plaintiff No.1(b)] is one of the legal heirs of [Late] Ahson Muhammad & [Late] Mrs. Rehana Ahson and the real sister of Plaintiff No.2 [Mr. Viqar Ahson] and Defendant [Zulfiqar Muhammad]. It has been further stated that the application has been moved to bring the true and correct facts on record and to assist the court for a just decision of the instant case. It has been stated that the claim of Plaintiff No.2 is contrary to the truth; and the deceased Plaintiff No.1, Mst. Rehana Ahson, was only made a party in the above suit for her name sake and no relief has been claimed on her behalf. It has been further stated that her father [late] Ahson Muhammad during his life time as gift purchased and transferred plots No.F-1/B-1 and F-1/B-2, Block 7, Clifton, Karachi in the names of Viqar Ahson and Zulfiqar Muhammad, Plaintiff No.2 and Defendant respectively and such information was also shared by her [late] father personally with the family, including all the legal heirs back in the year 1982. It has been stated that the construction was made only on the plot of Plaintiff No.2 and whereas the plot of defendant was only subjected to minor construction and this was so that until the time defendant needed to utilize it at a later stage in life. It has been further stated that Plaintiff

No.2 by filing the above suit has wrongfully claimed the ownership of both the plots [No.F-1/B-1 and F-1/B-2, Block 7, Clifton, Karachi]. It has also been stated that the Applicant along with other siblings has been impleaded as a party in the instant proceedings upon the death of her mother-Plaintiff No.1 being the legal heirs of the deceased and as such she did not want to go against the legal, moral principles and the desires as well as clear instructions of our late father whereby Plot No.F-1/B-1, Block-7, Clifton was given to the Defendant for his use and benefit.

3. Upon notice only Plaintiff No.2 filed counter affidavit to the instant application, denied the contents of the application and its supporting affidavit being false and misleading. It has been stated therein that Plaintiff No.1(b) has no right to intervene and make false allegations. It has been further stated that she has nothing to do with the present case as neither she is directly or indirectly being affected by the present proceedings, nor will she be affected by the final outcome of the same; if she has something to say, she should have been impleaded as a witness by the defendant, therefore, any assistance from her in the case will be out of context and this Court can reach to a just and fair conclusion without the assistance of the Applicant [Plaintiff No.1(b)] and she has no right or interest in the subject property. It has been further stated that the deceased mother of Plaintiff No.2 was impleaded as party to the suit for the sole reason that before filing the said suit, the defendant was attempting to sell one portion of the subject property and in this respect he had hired an estate agent who was bringing prospective buyers on the subject property, which resulted in invasion of privacy as the portion of the subject property was only accessible through the main gate as there was no separate gate. It is also stated that Applicant has filed the instant application with unclean hands and mala fide intentions which fact can be ascertained from the fact that she is a witness / signatory of the power of attorney executed by the deceased mother [Plaintiff No.1] in favour of Plaintiff No.2. All the documents and the facts have been brought on the record by Plaintiff No.2 and the Defendant, who are the contesting parties before this Court and this Court on the basis of these documents can resolve the controversy. It has been further stated that the subject property was always intended to be used and enjoyed as a single unit and the same

has been designed as one unit and the second portion is only the extension of main house with an intention to reduce the higher rate of property tax and utility charges and the Defendant has no right or entitlement over the subject property as he has already received the entire amount in lieu of such property as well as the construction on the subject property has been raised in such a manner that it cannot be physically divided into two equal portions. It has also been stated that since Plaintiff No.2 has neither sought any relief nor made any allegation against the Applicant in the plaint nor in the affidavit-in-evidence, therefore, the question of cross-examination by the Applicant does not arise. Lastly, it is stated that the application may be dismissed.

4. The Applicant preferred not to file any rejoinder to the above counter affidavit.

5. Leaned counsel for Applicant [Plaintiff No.1(b)] in support of the above application while reiterating the contents of the application and its accompanying affidavit has contended that the Applicant has been impleaded as party in the case being one of the legal heirs of her deceased mother [Plaintiff No.1]. After having impleaded in the case when she perused the plaint it revealed that Plaintiff No.2 in the plaint has made false and incorrect statements specially relating to his siblings. In this regard, learned counsel has referred to para-11 of the plaint. It is also contended that the Applicant in order to bring the truth on record before this court for a just and fair decision of the case, through this application seeks permission of this court to cross-examine Plaintiff No.2. Further contended that the truth will come on record if Plaintiff No.2 is subjected to cross-examination by the Applicant and as such the Applicant has a right to cross-examine Plaintiff No.2 notwithstanding the fact that he has been arrayed as one of the Plaintiffs [Plaintiff No.1(b)] in the proceedings. It is also contended that there would be no prejudice to Plaintiff No.2 in the event if this court allows the Applicant to cross-examine him. It is also contended that if Plaintiff No.2 does not wish to be crossed-examined by another Plaintiff [the Applicant] then the Applicant may be transposed as one of the defendants in the instant proceedings. Learned counsel in support of his contention has relied upon the case of Haji SHAUKAT HUSSAIN and 4 others v. Haji MUHAMMAD BAKHSH and 13 others [2004 SCMR 948].

6. Learned counsel for the defendant while supporting the application and the arguments advanced by the Applicant's counsel has contended that since there is no bar in law for cross-examination of one Plaintiff to another, therefore this court while exercising its inherent power under section 151 CPC may grant the instant application and allow the Applicant to cross-examine Plaintiff No.2. Per learned counsel in the present matter the evidence of Plaintiff No.2 has already been recorded and now the defendant has to lead evidence. Further he has already filed his list of witnesses wherein he has not arrayed the Applicant as witness, therefore, at this stage, the defendant cannot array the Applicant as witness and produce her for evidence. Moreover, if the Applicant not cross-examine the Plaintiff No.2, then he may come with the objection that since the Applicant did not cross-examine him, therefor, she is not entitled to give evidence in the case. Lastly, contended that in the interest of justice and to avoid further delay in the matter, the application may be allowed.

7. On the other hand, learned counsel for Plaintiff No.2, [Vaqar Ahson], while reiterating the contents of the counter of affidavit to the instant application has contended that instant application is not maintainable and further the same has been filed with malafide intention and with unclean hands as such it is liable to be dismissed. It is also contended that the Applicant is a witness / signatory of the power of attorney executed by the deceased mother of the Plaintiffs in favour of Plaintiff No.2, available on record, which is annexed with the *Vakalatnama* of Plaintiff No.2's counsel, therefore, Applicant at this stage cannot claim that she was not aware of the present case and / or the contents of the plaint when the suit was filed. It is also contended that since the Applicant has failed to rebut the contents of the counter affidavit by filing any rejoinder affidavit, therefore, whatever is stated in the counter affidavit is deemed to be admitted and on this ground alone instant application is liable to be dismissed. He further contended that in the present case Plaintiff No.2 neither sought any relief nor made any allegation either in the plaint or in the affidavit in evidence therefore the Applicant is not entitled to cross-examine Plaintiff No.2. It is also contended that since the Applicant has no right and interest in the property in question as such she has nothing to do in the present case and has no right to intervene and make false allegations.

Furthermore, her alleged assistance to the court is also not required as the material evidence have already been made available on the record by the contesting parties, that is, Plaintiff No.2 and the defendant. Learned counsel while referring to para-4 and 5 of the counter affidavit has submitted that if at all the Applicant intends to say something and to bring on record certain fact she could come as witness of the defendant and Plaintiff No.2 will have no objection in the event if the defendant will produce the Applicant as his witness. It is also contended that instant application has been filed just to prolong the matter as the evidence of Plaintiff No.2 has been completed and now it is the defendant to lead his evidence. Lastly, it is argued that the application filed by Applicant [Plaintiff No.1(b)] may be dismissed.

8. I have heard the learned counsel for the parties, perused the record as well as the case law cited at the bar.

From the perusal of record, it appears that Plaintiff No.2 along with his mother- Plaintiff No.1, filed this suit on 23.07.2013 against the defendant for Declaration and Permanent Injunction with the following prayer:-

- A- Declare that the Plaintiff No.2 is the owner and title holder of the subject property which includes both the First and Second Portion as mentioned hereinabove.
- B- Restrain the Defendant and any of his agents or assignees from disposing off / selling or in any manner causing any damage to the subject property or either of the two portions in question.
- C- Any other additional / alternate relief as this Honourable Court may deem fit and appropriate
- D- Cost of the suit.

9. The claim of Plaintiff No.2, as per the Plaint of the present suit is that he is the owner and title holder of both the first and second portions of the suit property. Whereas he himself admits that first portion admeasuring 600 square yards was leased out in the Plaintiff No.2's name and the other portion which is also admeasuring 600 square yards was leased out in the Defendant's name. On the other hand, the Defendant in his written statement has taken a plea that Plaintiff No.2 has approached this Court with unclean hands and has based his case on fictitious facts and his claim is not even supported by the documents filed by him. It has been stated that the second portion

of the property belongs to him as he is the lawful owner of the said portion. Out of the pleading issues were framed and commissioner was appointed for recording evidence. In the meanwhile, Plaintiff No.1 died and her legal heirs were brought on record through amended title. In the amended title the Applicant was impleaded as Plaintiff 1(b) being one of the legal heirs of Plaintiff No.1. Record also reflects that after completion of the cross-examination of Plaintiff No.2 by the defendant's counsel a dispute cropped up when the Applicant's counsel intended to cross examine the Plaintiff No.2. During the cross-examination of Plaintiff No.2, it was also transpired that the Applicant filed instant application on 02.02.2019. Consequently, the matter was referred back to the court.

10. I have examined instant application and the affidavit in support thereof; before going into any further discussion it would be appropriate to reproduce the same as under:

“APPLICATION UNDER SECTION 151 CPC

That it is respectfully prayed on behalf of the newly impleaded Plaintiff No.1(b) that while adjudicating upon the instant suit and other ancillary, incidental and/ or subsequent proceedings, this Hon'ble Court may be pleased to take the facts recorded/mentioned in the accompanying affidavit into consideration.

Whatever stated above is true and correct.

Sd.

Advocate for the Plaintiff 1 (b)”

From the perusal of the application and the affidavit in support thereof, it appears that the Applicant neither in the application nor in the affidavit sought any permission from this court for cross-examination the Plaintiff No.2. However, learned counsel for the parties have emphatically argued on such point, which in my view is beyond the scope of the application. Nonetheless, since the counsel have argued on such point, I would like to dilate upon the said issue.

Article 133 of Qanun-e-Shahadat Order 1984, deals with examination of witness, which state as under:-

“133. Order of examinations: (1) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

[Emphasis supplied]

(2) The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine that matter.

From the perusal of the above, it appears that the right of cross-examination belongs to an adverse party. Reliance in this regard can be placed on the cases of ARBAB TASLEEM v. The STATE [PLD 2010 SC 642] and MUHAMMAD NAZIR KHAN v. MUHAMMAD AMEER [2012 CLD 649].

The term ‘Adverse Party’ have been defined in legal dictionaries as under:-

In **Black Law’s** Dictionary, at Page 1144 (7th Ed. 1999) it is defined as follows:

‘A party whose interests are opposed to the interests of another party to the action.’

Prem & Saharay’s Judicial Dictionary of Words and Phrases, (2nd Edition-2016) VOLUME –I. Page 213 defined the term as follows:

‘A party to an action whose interests are opposed to or opposite the interests of another party to the action.’

Words and Phrases, Legally Defined (Fourth Edition). Volume -1. Page 80 defined as follows:

‘An ‘opposite party’ has been held to mean a party on the other side of the record to the Applicant, or a party on the same side between whom and the Applicant there is some right to be adjusted in the action. A party to a cause or matter may be said to be adverse in interest to another party if he has a direct pecuniary or other substantial legal interest adverse to the legal interest of the other party, even although they may be upon the same side of the record and there is no issue on the record that the Court will be called upon to adjudicate between them.’

11. Though there is no specific provision in the law for providing such an opportunity for a Plaintiff to cross-examine a co-Plaintiff and/or defendant to co-defendant, however, having regard to the object and scope of cross-examination, it is settled law that when allegations are made against a party to the proceedings, before that evidence could be acted upon, that party should have an ample opportunity to cross-examine the person who had given the evidence against him. It is only

after such an opportunity is given, and the witness is cross-examined that evidence becomes admissible. In this regard, it is useful to refer to the following passage from the Law of Evidence by Sarkar [sixteen edition p. 2351] on the subject.

"No special provision is made in the Evidence Act for the cross-examination of the co-accused's or co-defendant's witnesses. But the procedure to be adopted may be regulated by the well-known rule that no evidence should be received against one who had no opportunity of testing it by cross-examination; as it would be unjust and unsafe not to allow a co-accused or co-defendant to cross-examine witness called by one whose interest was hostile to his own, or who has given evidence against him. If a co-defendant's interest is not hostile to that of the other defendant, or if nothing has been said by the said defendant to effect the interest of a co-defendant, there cannot be any right of cross-examination."

[Emphasis supplied]

12. The essence of cross-examination is that it is the interrogation by the advocate of one party to a witness called by his adversary with the object either to obtain admissions from such witness favourable to his cause or to discredit him. Since it is settled that the right of cross-examination belongs to an adverse party, therefore, a party who does not hold that position should not be allowed to take part in the cross-examination.

13. A perusal of the plaint and affidavit in evidence as well as the cross-examination of Plaintiff No.2, do not show that either the said Plaintiff has sought any relief against the Applicant or levelled any allegation against her. Thus, keeping in view the discussion in the preceding paras, in my opinion, Applicant [Plaintiff No.1(b)] does not fall within the category of 'adverse party' and as such she has no right to cross-examine the Plaintiff No.2. However, if the Applicant intends to bring on record any fact she may do so through her evidence as being defendant's witness, no matter if her name is not mentioned in the list of witnesses filed by the defendant.

The application [CMA No. 1744 of 2019] is disposed of in the above terms.

JUDGE

Karachi
Dated: 11.02.2020