

IN THE HIGH COURT OF SINDH
CIRCUIT COURT MIRPURKHAS

Constitution Petition No.D-30 of 2024
(*Zaheer Ahmed Khan Vs. Govt. of Sindh & others*)

DATE ORDER WITH SIGNATURE OF JUDGE

Before;
Adnan-ul-Karim Memon, J
Amjad Ali Bohio, J

Date of hearing & Order 19.08.2024

Mr. Tahseen Ahmed H. Qureshi, advocate for the petitioner
Mr. Muhammad Sharif Solangi, A.A.G Sindh,
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ORDER

Adnan-ul-Karim Memon, J. The petitioner, Zaheer Ahmed Khan, has filed a petition under Article 199 of the Constitution of Pakistan to challenge the court's dismissal of his application to submit evidence through affidavits. The court rejected his application, stating that there was no sufficient reason to allow this and that witnesses must be examined in open court.

2. The petitioner argues that the court's decision is incorrect and that he should be allowed to submit evidence through affidavits under Order XIX Rule 1 CPC. He cites Article 130 and Article 132 of the Qanoon e Shahadat Order, which provide for the admissibility of affidavits as evidence under certain conditions. Article 130 and Article 132 of the Qanoon e Shahadat Order which provides as under: -

“**130.Order of production and examination of witnesses.** The order in which the witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law by the discretion of the Court.”

“**133. Order of examination.** (i) 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.

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

Petitioner being aggrieved by and dissatisfied with the Order dated 27-08-2021 assailed the same in Civil Revision Application No.46 of 2021 which was too dismissed by learned District Judge Mirpurkhas, vide order dated 14-04-2022. For convenience's sake, an excerpt of the order is reproduced as under:-

“7. I have carefully gone through the grounds agitated in the instant revision application. The learned counsel for the petitioner has not assigned any sufficient reason for not producing the witnesses for their examination-in-chief and then cross-examination in open Court. He has also not satisfied the Court that what prejudice will be caused to the witnesses if instead of affidavits in evidence their evidence is recorded in open Court. It is also to be noted that it is a settled and undisputed practice of Civil and Criminal Courts that evidence used to be recorded in open Court in civil and criminal matters.

8. I have also gone through the case laws cited at bar by the learned counsel for the applicants but none of the cited cases covers the subject matter of the instant case, hence are distinguishable and inapplicable to the facts of the present case.

9. I do not find any illegality, irregularity, and jurisdictional error in the impugned order which is hereby upheld and the instant revision application is dismissed with no order as to the costs.”

3. The petitioner's counsel argues that the court's orders were incorrect because they prevented the petitioner from submitting evidence through affidavits. He contends that affidavits are a form of evidence under Pakistani law, and there are no specific rules prohibiting their use in civil proceedings. He cites several cases to support his argument, including cases where affidavits have been allowed in various types of proceedings. The counsel argues that the courts below erred in not considering the possibility of allowing affidavits as evidence and that their orders should be set aside. In support of his contentions, he has relied upon cases of Bank of Credit & Commerce International (Overseas) Ltd. Vs. Karachi Tank Terminal Ltd. & 03 others [PLD 1998 Karachi 261], Muhammad Naeem Khan Vs. Muqadas Khan [PLD 2022 SC 99], Allahuddin Malik Vs. Late Dr. Abdul Jalil [PLD 2022 Sindh 147], Razia Sultana & 04 others Vs. Razia Begum & 03 others [PLD 2005 Lahore 209], Muhammad Nawaz Vs. Barkat Ali [PLD 2004 Lahore 21], Meera Shafi Vs. Ali Zafar [PLD 2023 SC 211], Mst. Farah Naz Vs. Judge Family Court, Sahiwal & others [PLD 2006 SC 457].

4. None present on behalf of the private respondents, though served through publication vide order dated 7.5.2024, in such a situation this court is left with no option but to hear the learned counsel for the petitioner and learned AAG on the subject issue involved in the present proceedings.

5. To understand the rule position of the case it is expedient to have a glance over Rule 4 of Order 18 of the Code of Civil Procedure 1908 ("CPC"), Section 151 of the CPC and Articles, 130,132 133 and 164 of the Qanun-e-Shahadat Order 1984 ("QSO"):

Rule 4 of Order 18 of CPC: 4. Witnesses to be examined in open Court: The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

Section 151 of CPC: 151. Saving of inherent powers of Court: Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court, to be exercised after recording reasons in writing,¹ to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

"130.Order of production and examination of witnesses. The order in which the witnesses are produced and examined shall be regulated by the law and practice for time being relating to civil and criminal procedure respectively, and, in the absence of any such law by the discretion of the Court."

"133. Order of examination. (i) 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.

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

Article 164 of the QSO: 164. Production of evidence that has become available because of modern devices, etc.: In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques.

6. The Supreme Court ruled that the word "attendance" in Rule 4 of of Order 18 e CPC can be extended to include "virtual attendance" via video conferencing. This means that witnesses can give evidence remotely, as long as it can be ensured that they are doing so freely and without undue influence. The court also noted that the CPC does not explicitly prohibit evidence through affidavits, and that courts have the inherent power under Section 151 to allow such evidence if it is necessary for justice. The Supreme Court reiterated that affidavits can only be relied upon under certain circumstances and subject to specific safeguards. If the opposing party contests the allegations in an affidavit or demands cross-examination, the party relying on the affidavit must produce the deponent for questioning. Failure to do so will invalidate the affidavit as evidence.

This is consistent with the principles of natural justice and fair play, which allow parties to cross-examine their adversaries and witnesses. The court also clarified the distinction between Rule 1 and Rule 2 of Order XIX of the CPC, which govern affidavits in proof of facts and affidavits in proof of or against applications, respectively.

7. The Supreme Court held that Article 164 of the QSO allows for the admission of evidence obtained through modern devices or techniques. This includes oral evidence of a witness that becomes available through video conferencing. The court emphasized the importance of adapting the law to modern technology to improve the efficiency and accessibility of justice. By allowing video conferencing, the courts can enhance access to justice, promote fair trials, and ensure more efficient and expeditious justice. This interpretation of the law advances the fundamental rights under Articles 9 and 10A and the principle of policy under Article 37(d) of the Constitution.

8. The Supreme Court emphasized that the courts have discretionary powers under Section 151 of the CPC and Article 164 of the QSO to allow virtual attendance of witnesses. However, this discretion must be exercised judiciously and based on valid reasons. The courts should consider whether the witness's evidence is essential for a just decision and whether requiring physical attendance would cause unreasonable delay, expense, or inconvenience. The standard for "unreasonable delay, expense, or inconvenience" is provided in various articles of the QSO and the Code of Criminal Procedure.

9. The trial Court and the Revisional Court have erred in disallowing the application for the reason that discretion can be exercised by allowing the witnesses to be examined through the affidavit in evidence and their evidence is subject to cross-examination by the respondent. Besides, no prejudice shall be caused to either side, if the witnesses are allowed to file their affidavit in evidence with the permission of the Court, as such their orders rejecting the prayer of the petitioner are not sustainable. The present petition is, therefore, allowed. Both the impugned judgment/order are set aside, and the application of the petitioner for recording his examination in chief through an Affidavit in evidence is allowed subject to cross-examination by the other side. The suit proceedings shall be concluded within two months.

JUDGE

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