JUDGMENT-SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

JUDICIAL DEPARTMENT
Writ Petition No.1572 of 2022

UsmanSaad
Versus
The Additional District Judge, Islamabad & 5 others

Petitioner by: Mr. Furqan Ahmad Mirza, Advocate.
Respondents by: Mr. Shafiq-ur-Rehman Dab, Advocate
Date of hearing: 07.09.2022

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ARBAB MUHAMMAD TAHIR, J: Through the instant writ petition, petitioner namely *Usman Saad* impugns order dated 20.04.2022, passed by the learned Additional District Judge Islamabad-West, whereby his application for summoning of a witness through court was dismissed. The reasons prevailed with the learned Trial Court to decline the application had been to the following effect:-

> "First thing to be considered in this case is that the petitioner has failed to mention the impugned witness in the list of witnesses required to be furnished not later than fifteen (15) days of framing of issues. Although, this omission can be made good subsequently but for it a good cause is required to be shown as per Order XVI Rule 1 CPC. In the case in hand, it is disclosed from the record that the petitioner/plaintiff was clear from the day first regarding the desired testimony expected from the impugned witness but he failed to mention her name or even to file the list of witnesses. At this stage, the summoning of said witness would amount to fill up the lacuna and to struck the defendants by a surprise. Even otherwise, the petitioner has not been able to explain that in what way, the testimony of the intended witness shall be necessary for the just decision of the case. When the law provides a specific mode/manner to do a certain thing, it should be done in the same way and not otherwise. Having failed to furnish the list of witnesses and to explain the relevancy of alleged testimony to the subject matter, I am not inclined to accept the subject application; therefore, the same is dismissed."

2. As apparent from the observation ibid, in the opinion of the Court, the *petitioner had not been able to explain that in what way, the testimony of the intended witness shall be necessary for the just decision of the case.*

3. Tersely, the bone of contention that led to filing of suit for recovery of damages by the petitioner is his release from service as "Accounts Officer", Finance Directorate, Bahria University, respondents-defendants, vide letter dated 30.06.2021, purportedly issued in terms of Clause 3 of the Employment Contract, inter-se the petitioner and the respondent University. The case setup by the petitioner in the plaint, predominantly had been to the effect that he was thrown out of service on account of self asserted, maneuvered and created psychological test *(paragraph 7 of the plaint)*. According to the petitioner, on the direction of the respondents' administration, he got conducted psychological test on 17.04.2021 from Reliance Hospital BahriaTown from a renowned Clinical Psychologist (PMDC) which report was illegally and without assigning any reason was discarded by the defendants 1 to 3(p*aragraph 6 of the plaint*).

4. The respondents in their written statementasserted that the petitioner was released from the contractual employment in terms of clause 3 of the Employment Contract with payment of one month basic salary; that reason for termination of the petitioner remained his below average **and his ill-disciplined** for which he was warned numerous time (*para-6 & 10 of preliminary objections)*. The response to paragraph No.6 with regard to having undergone psychological test on 17.04.2021, the respondents in para-6 of written statement on facts maintained that "the plaintiff was having cantankerous behaviour towards his colleagues. *He misbehaved with other employees of the university numerous times, hence, he was sent to the well-being Centre of Bahria University for his psychological assessment.* In subsequent Para No.7, the respondents again asserted **that the reason for termination of the petitioner had been his bad performance and ill-behaviour**.

5. The tentative examination of the pleadings of the parties, that emanate from the documents made available on the file, it is surfaced that from the day one, there was a contest between the parties with regard to behaviour of the petitioner, made basis to oust him from the service by invoking clause 3 of the Contract Agreement. On account of failure of the petitioner to name the proposed witness in the list of witnesses at the relevant time, his request was turned down vide impugned order, hence instant writ petition.

6. The learned counsel argued that evidence of the proposed witness is essential for just decision of the case; that the document is mentioned in the list of witnesses; that the petitioner in his statement also placed reliance upon the same and that in order to counter the version of the respondents/defendant, with regard to his ill-behaviour, the petitioner should be afforded an opportunity to substantiate his claim of having sound physical and mental health, so determined by the proposed witness vide report dated 17.04.2021. The learned counsel in support of his submission placed reliance on "**Amjad Khan v Muhammad Irshad (deceased) through LRs** (2020 SCMR 2155).

7. On the other hand, the learned counsel for respondents repelled the above submissions. It was argued that a witness whose name is not mentioned in the list of witnesses, cannot be examined in terms of Rule 4 of Order XVIII; that the provision of order XVI could only be invoked if a witness list had been provided and not otherwise as the object of a such requirement is that no one should be taken by surprise in the course of the trial and the parties, before commencement of trial must be conscious, aware and fully prepared as to what kind of evidence was expected to be given by the witnesses of the opposite side. Learned counsel relied upon case law reported as **2016 SCMR 1976, PLD 2013 SC 255, 2017 CLC 119 (Islamabad), 2019 CLC 183 (Lahore(Multan Bench),**

2021 MLD 1395 (Lahore)2018 CLC 1937(Lahore, Multan Bench.)

8. Heard, record examined.

9. The relevant facts of the case have been mentioned above, therefore, need not to be reiterated. On the subject, the pre-requisite is to advance *good cause* to explore that the testimony of the intended witness is essential for just decision of the case. On this aspect, the learned Trial Court rendered the opinion in terms that the petitioner had not been able to explain that in what way, the testimony of the intended witness shall be necessary for just decision of the case.

10. The reason of expulsion of the petitioner from the service as asserted by the respondents is *ill-behaviour* of the former which is being hotly contested on the basis of report, authored by the proposed witness, who statedly medically examined the petitioner and rendered her opinion with regard to mental health of the petitioner. The case of the respondents is not to the effect that it was a simple termination of a service contract in terms of clause 3 of the Contract Agreement rather the reason made basis to oust the petitioner from service is *ill-behaviour*. The petitioner is questioning the said reasons due to having everlasting impact upon his future prospect. The petitioner has questioned the said reasons being the result of malice and malafide on the part of the respondents who allegedly from the day one of his job, had been trying to oust him from the service and he was also not appointed against the post for which he had qualified.

11. The document i.e. the report dated 17.04.2021 is mentioned in the list of documents at **serial No.10**. The certificate dated 17.04.2021 is also part of record. It is settled principle that law favours adjudication on merits instead of technical knockout. When the respondents/defendants are relying upon the psychological assessment report dated 21.05.2021 authored by respondent No.6 Dr. Rizwana Ameen, it does not appeal to the reason as to why the petitioner is being restrained to advance his case by producing the

proposed witness to substantiate his medical assessment report authored by the proposed witness. This treatment, on the face of it, in the estimation of this Court would be against the spirit of natural justice and also offensive to right of fair trail envisaged inArticle-10-A of the Constitution.

12. To allow the petitioner to produce the intended witness shall in no way cause prejudice to the respondents who shall have a right to subject the said witness to cross-examination and if they intend to counter the version of the petitioner based on the report dated 17.04.2021, in the interest of justice, may opt to make a request to the trial court to produce any witness, if need be. In that eventuality, the petitioner shall have a right to subject the said witness to cross-examination.

13. The pleadings of the parties, as noted above, do not suggest that the petitioner has failed to explain the relevancy of testimony of the proposed witness as observed by the learned Trial Court in paragraph No.5 of the impugned order.

14. It is settled principle that this Court must not exercise constitutional jurisdiction in order to interfere with the discretion exercised by lower courts unless the same suffers from jurisdictional, factual or legal error. However, such interference would be justified in cases where the impugned order had been passed without jurisdiction or is based on misreading or non-reading of evidence, or is not in accordance with law. Reliance is placed upon "***Mst. Mobeen Fatima v. Muhammad Yameen (PLD 2006 SC 2014)*** and ***"Nadira Shahzad v. Mubashar Ahmad (1995 SCMR 1419)***."

15. The aspect of taking the respondents by surprise in the course of the trial at the hands of the petitioner is not available in the present case as it had been stance of the petitioner as mentioned above in his plaint which had been controverted by the respondents in their written statement while the report dated 17.04.2021 is

mentioned in the list of documents. It is open for the Court to allow the production or summoning of the witness at a belated stage upon showing a good cause.

16. The Hon'ble apex court in the recent pronouncement dated 06.06.2022 in the case of **President ZTBL Head office Islamabad v. Kishwar Khan and others** (**C.P. No.419 of 2020**) has graciously held that "**the function of the Court is to do substantial justice and not to knockout or non-suit the parties on technicalities**. It had graciously been quoted that "**law is made for man and not man for the law."** It has also been emphasized that **Article 10-A of the Constitution, right to fair trial and due process is also a fundamental right of great magnitude therefore, should be respected and followed being an integral part of due process**.

17. Having examined the case from every angle, for reasons mentioned above, impugned order is not legally sustainable. Consequently, the instant writ petition is **allowed**, impugned order dated 20.04.2022 is set aside. However, the petitioner shall himself produce the proposed witness at his own cost, with right of cross-examination to the respondents. There shall be no order as to costs.

(ARBAB MUHAMMAD TAHIR)
JUDGE

*A.R. Ansari**

Announced in open Court on : .09.2022.

JUDGE.

Approved for reporting.