

JUDGMENT SHEET  
**IN THE HIGH COURT OF SINDH, KARACHI**  
**Suit No. 1884 of 2015**

Plaintiff : Muhammad Imran Khan,  
through Sub-Attorney Abdul Khalique.

Defendant No.1 : Haji Muhammad Akhtar,  
through M/s. Mirza Sarfaraz Ahmed and  
Nawab Din, Advocates.

Defendant No.3 : Abdul Majeed,  
through Mr. Muhammad Anwar Shahid,  
Advocate.

Defendant No.9 : Director (T.P) E.D.P., Town Planning  
Department, Malir Development Authority,  
Karachi, through Mr. Iqbal Khurram,  
Advocate.

Mr. Dilawar Hussain Advocate, learned  
Commissioner for recording evidence of  
parties, present in person.

Date of Hearing : 16.10.2020 & 22.02.2021.

Date of Order : 22.02.2021.

**ORDER**

**ZAFAR AHMED RAJPUT, J:** - Through this order, I intend to dispose of C.M.A. No. 673 of 2020, filed on behalf of the defendant No. 1, under order XVIII, rule 3 read with Section 151 of C.P.C., seeking permission to cross-examine the defendant No. 3.

2. Learned counsel for defendant No. 1 has contended that the plaintiff and defendant No. 3 did not permit the learned Commissioner, appointed for recording evidence of the parties, to allow him to conduct cross-examination on defendant No. 3; hence, this application has been moved. He has further contended that after closing of the plaintiff's side for evidence and examination of defendant No. 1, the defendant No. 3(iii), namely, Imtnan-ul Majeed filed his affidavit-in-evidence and, thereafter, his examination-in-chief

was recorded by the learned Commissioner; wherein he denied the signature of his late father Abdul Majeed on power of attorney by deposing that the same are bogus, false, fake and different from his actual genuine signature. Learned counsel has added that by deposing such evidence, defendant No.3 (iii) he pleaded the case of plaintiff, adversely to the right and interest of the defendant No. 1; therefore, defendant No. 1 is entitled to cross-examine him as he deposed falsely. He has further contended that under the law there is no restriction to allow a defendant to cross-examine co-defendant when the evidence of co-defendant is directly against the interest of a defendant; hence, refusal of the Commissioner to allow the defendant No.1 to cross-examine defendant No.3 (iii) is against the law.

**3.** On the other hand, learned counsel appearing for defendant No. 3 has vehemently opposed this application on the ground that same is not maintainable in law. He has maintained that the signatures of the deceased father of the defendant No. 3 on the power of attorney are bogus, false, fake and different from his actual signature and the deceased father of defendant No. 3 always shared and disclosed all matters with defendant No. 3(iii) and his other family members, who never ever disclosed about the suit property; hence, no question arose that the deceased defendant No. 3 ever executed any sale deed or he was attorney of Mst. Sarwari Begum. He has further maintained that the cross-examination of defendant No. 3(iii) has already been conducted by the plaintiff and the defendant No. 1 has no legal right to cross-examine him; hence, this application being not maintainable in law is liable to be dismissed.

**4.** Heard the learned counsel for the parties and perused the material available on record.

5. The sole point that falls for the consideration of this Court is “*whether a co-defendant had the right of cross-examining the deposing co-defendant in case of conflict of interest between the two?*”

6. The procedure of examination of witnesses is synchronized by Articles 130 to 161 of the Qanun-e-Shahadat Order, 1984 (“*the Order*”). Article 130 of the Order aims to regulate procedure as to production and examination of witnesses in the Court, while Article 132 provides three stages for the purpose of recording evidence. First stage is examination-in-chief, second stage is cross-examination and third stage is re-examination. For the sake of convenience, Article 132 (ibid) is reproduced here, as under:

*132. Examination-in-chief, etc. (1) The examination of a witness by the party who calls him shall be called his examination-in-chief.*

*(2) The examination of a witness by the adverse party shall be called his cross-examination.*

*(3) The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.*

*(Emphasis supplied)*

7. The expression “*adverse party*” is defined in the Black’s Law Dictionary, Sixth Edition at page 53, as “*a party to an action whose interests are opposed to or opposite the interest of another party to the action*”. In general, an adverse party is an opposing party in a lawsuit.

8. It may be observed that there is no specific provision in the Order providing for such an opportunity for a defendant to cross-examine a co-defendant; however, having regard to the object and scope of cross-examination, it is settled principle of law that when allegations are made against the party to the proceedings, before that evidence could be acted upon, the 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 then evidence becomes admissible. In this regard it would be useful to refer to here passages in the law of evidence by learned authors on the subject, as under:-

***Sarkar on Evidence, Fifteen Edition at page 2182 & 2183:***

*Right to cross-examine Co-Accused's and Co-Defendant's Witnesses. Sections 137 and 138 of the Evidence Act do not specifically refer to cross-examination of co-defendant's witnesses. But the Court have to adopt a golden rule that no evidence shall be received against an co-defendant or co-accused 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 case was adverse to his, or who has given evidence against him. Where it is shown that the interest between the defendants inter se conflict each other, the other defendant has necessarily to be treated as an adversary and he is certainly entitled to cross-examine the other or his witnesses. [Mohd. Ziaulla v. Sorgra Begum, 1997 AIHC 2628 (2629-2630) (Kant)]*

*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 case was adverse to his, or who has given evidence against. If there is no clash of interest or if nothing has been said against the other party, there cannot be any right of cross-examination.*

***“Phipson on Evidence”, Tenth Edition, para. 1538.***

*A defendant may cross-examine a co-defendant or any other witness who has given evidence against him, and reply on such evidence though there is no issue joined between them. (Lord v. Colvin, 3 drew 222; Allen v. Allen {1894} P. 248 (C.A.); RE Wagstaff, 96 L.T. 605; Dryden v. Surrey C.C. {1936} 2 All E.R. 535).*

9. It may be understood unambiguously from afore-mentioned passages that it is settled law 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 defendant to cross-examine a co-defendant, or a witness called by co-defendant, whose case/evidence is adverse to him, or who has given evidence against him. If there is no conflict of interest, such an opportunity needs not to be given. Therefore, the condition precedent for giving an opportunity to a defendant to cross-examine a co-defendant is either from the pleadings of the parties or in the evidence, there must exist conflict of the interest between them. Once it is demonstrated that their interest is not common and there is a conflict of interest and evidence has been adduced adversely affecting the interest of the defendant then before the Court could act on that evidence the defendant, against whom the evidence is given adversely by the co-defendant, should have an opportunity to cross-examine the co-defendant, so that ultimately truth emerges on the basis of which the Court act.

**10.** In the case in hand, it has specifically been pleaded by the defendant No.1, which has not been denied by the defendant No.3 (iii), that the defendant No.3 in his deposition has pleaded the case of plaintiff, adversely to his right and interest. If so, the position of the defendant No.3 (iii) for defendant No.1 in the case is that of “adverse party”; entitling him to cross-examine defendant No.3 (iii).

**11.** For the foregoing facts and reason, I allow instant C.M.A. by directing the learned Commissioner to record cross-examination of defendant No. 3 by learned counsel for defendant No. 1. He is expected to conclude the Commission within a period of two months hereof.

JUDGE