NON-APPEARANCE OF A PARTY AS ITS OWN WITNESS

LECTURE DELIVERED ON 11TH JUNE, 2013
BY MR. JUSTICE SYED JAMSHED ALI,
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DIRECTOR GENERAL OF THE PUNJAB JUDICIAL ACADEMY,
TO THE PARTICIPANTS OF TRAINING COURSE OF
ADDITIONAL DISTRICT & SESSIONS JUDGES.

The object of Law of Evidence is:-

(i) Evidence to be pinned down on all matters in issue by relevant material.

(ii) Best evidence must be tendered.

(iii) The hearsay evidence must be kept out.

2. The underlying idea is to ensure that irrelevant material does not encumber the record which may disguise truth rather than to discover it. The proposition that an adverse presumption may be drawn in case a party does not appear to support its own case is rooted in Article 129 of the *Qanoon-e-Shahadat* Order, 1984. The relevant provision is reproduced hereunder:-

"129. ***Court may presume existence of certain facts***.- The Court may presume existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case--

Illustrations.

The Court may presume--

(a) …….
(b) ……..
(c) ……..
(d) ……..
(e) ……..
(f) ……..

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who with-holds it".

As a matter of fact clause (g) of Article 129 emphasizes the rule of production of best evidence. There have been quite a large number of cases in which the Superior Courts have expressed themselves on the issue.

3. A survey of the Judgments of various courts explaining the application of this provision is as follows:-

(i) ***Sardar Gurbakhsh Singh*** *Vs*. ***Gurdial Singh and another*** (AIR 1927 P.C.230).

Sardar Jawala Singh, a Jagirdar of East Punjab, took two wives. From one, a daughter was born while the other was issueless. According to the custom in the family, in the absence of a son, the property of the deceased devolved on the collaterals but in case a posthumous son was born, he was entitled to inherit to the exclusion of the collaterals. Almost immediately after the death of Jawala Singh the younger wife, who already had a ten years old daughter, disappeared. During the mutation proceedings, collaterals claimed the entire property. In counterclaim the elder widow claimed the birth of a son to the younger wife in a remote village adjoining the native state. All the courts below accepted the claim of the birth of posthumous son. However, none of the widows particularly, the elder one, appeared in the court in support of the contention. The observation of the Privy Council was that:-

> "*The true object to be achieved by a Court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination".*

Accordingly the Privy Council allowed the appeal. In fact this was the first leading case and has been followed in a number of other cases.

(ii) ***Kirpa Singh*** *Vs*. ***Ajaipal Singh and others*** (AIR 1930 Lahore 1).

Proceedings in a suit under section 92 CPC in respect of religious institution i.e. Sikh Gurdawara, were initiated. It was alleged to be a public trust. The plaintiffs claimed interest in the trust as members of the Sikh community and worshipers of the Gurdawara. The suit was decreed and the Manager of the Gurdawara was removed. In appeal, the learned Lahore High Court noted that *locus standi* of the plaintiffs to maintain the suit was in question regarding their interest in the management of the Gurdawara particularly the question whether they were Sikhs or Nirmala Sadhus. None of the plaintiffs had appeared to prove their interest in the said trust property. The following observations were made:-

> *"Plaintiffs were the best persons to give evidence as to the 'interest' possessed by them in the institution and their failure to go into the witness-box must in the circumstances go strongly against them".*

In this case reliance was placed on the judgment of ***Sardar Gurbakhsh Singh*** *(supra)* and the appeal was allowed.

(iii) ***Allah Ditta*** *Vs*. ***Mt.Bhagan and others*** (AIR 1930 Lahore 401-DB).

In this case the plaintiff sued for his share in the estate of a deceased Mohammadan on the ground that as a collateral he was entitled to a share in the estate. The suit was dismissed and the High Court further observed as under:-

> *"It is significant that the plaintiff himself has not gone in the witness-box to prove the alleged relationship nor has any near relation been produced, though it is admitted that several are still alive".*

(iv) ***Mortand Pandharinath Chaudhari*** *Vs*. ***Radhabai Krishnarao Deshmukh*** (AIR 1931 Bombay 97).

In this case also ***Sardar Gurbakhsh Singh*** *(supra)* was followed. It was a suit for partition and the nature of the property whether joint or had been partitioned was involved. The Honourable Court made the following observation:-

> *"It is bounden duty of a party personally knowing the facts and circumstances to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case".*

(v) ***(Firm) Kanhaya Lal-Bisakhi Ram*** *Vs.* ***(Firm) Bishen-Das- Mewa Ram*** *(AIR 1934 Lahore. 59).*

It involved a suit for damages for breach of contract. The suit was decreed and decision upheld in appeal. The defendant had totally denied that he had ever entered into any contract with the plaintiff. In this case the learned courts below had relied on the case of ***Sardar Gurbakhsh Singh*** *(supra)* to hold that the defendants had not gone into the witness-box. The learned High Court observed that:-

> *"The defendants had totally denied any knowledge of the contract on which the plaintiff based his suit and in the circumstances it cannot be said that there were any facts peculiarly within their knowledge and yet they had failed to go into the witness box to depose those facts".*

The judgments and decrees of the two courts were set aside.

(vi) ***Puran Das Chela*** *Vs*. ***Kartar Singh and others***
(AIR 1934 Lahore 398-D.B).

The question involved in this case was the nature of place of worship whether it was a Sikh Gurdawara. The Courts below found it to be so, but the defendant, who has` been contesting/agitating

against this finding had not appeared to depose. The learned High Court made the following observation:-

> *"The majority of the tribunal have accepted the evidence of the Sikh witnesses concerning the worship carried on in the institution within living memory and the evidence stands for practical purposes un-contradicted the petitioner himself, as I have already stated, did not himself give evidence, and in view of the fact that he performed the worship and is the best informed person about its nature, his failure to given an account of the nature of the worship may be taken as an indication that he could say nothing convincing to support the case that Sikh worship was not conducted by him during his terms of office".*

(vii) ***Mt. Mohammad Sultan Begam*** *Vs*. ***Saraj-ud-Din Ahmad***
(AIR 1936 Lahore 183).

It was suit for dower in which the widow had not appeared. The learned Court did not find it to be fatal with the following observations:-

> *"If the widow in a suit for dower does not enter into the witness box to prove her dower, this ought not to be treated as a circumstance against her, since Mahomedan ladies are reluctant to give evidence".*

Even otherwise, it may be stated that it was not such a special fact which was only in the knowledge of the widow.

(viii) ***Johan Das*** *Vs*. ***Ganga Ram and others***
(AIR (36)1949 Himachal Pradesh 7).

The collaterals were claiming inheritance in this case and none of them had appeared to support the relationship with the deceased. The learned court relying on the case of ***Sardar Gurbakhsh Singh*** *(supra)*, made the following observation:-

> *"It is the bounden duty of a party (the plaintiff) personally knowing the whole circumstances to give evidence. His non-appearance as witness would be the strongest possible circumstance to discredit the truth of his case".*

(ix) ***Devji Shivji*** *Vs.* ***Karsandas Ramji and another*** (AIR 1954 Patna 280).

In this case the suit of the plaintiff was for declaration asserting that the registered deed of assignment was a *Benami* transaction. The suit was dismissed and appeal filed against that was also dismissed. The observation made by the court was that:-

> *"In no case can the evidence of this lady be preferred to the evidence of the defendant No.1, and it was a fatal mistake on the part of the plaintiff to avoid coming as a witness in this case. Certain very important allegations had been made in the written statement, and the plaintiff having personally executed the deed of assignment sought to be set aside, could not keep himself away from the witness box, and if he has chosen to keep himself away, he has taken the heavy risk of the court accepting the allegation made by the defendant No.1".*

(x) ***(Pathuri) Subrahmanaya Sastry*** *Vs*. ***(Puthuri) Lakshminarasamma and others*** (AIR 1958 Andhra Pradesh 22).

It was a suit for possession by the widow of the deceased. The property was in possession of the first defendant in the suit, who claimed to be an adopted son of the deceased. The suit was decreed. The first defendant appealed against the judgment and decree which was also dismissed with the following observations:-

> *"The 1st defendant himself, who was about 22 years old at the time of the trial, which took place in March 1951 (in fact he is described in the plaint which was presented in April 1949 as being aged 22 years) has not examined himself although he must have been in a position to tender evidence as to the adoption, because he must have been not less that 13 or 14 years old at that time and should have been able to remember the occasion".*

(xi) ***Mohammad Shafique*** *Vs*. ***Union of India and others*** (AIR 1963 Calcutta 399).

This was a case of compensation for non-delivery of a consignment through the Railways. Both the courts dismissed the case, *inter alia,* on the ground that the plaintiff had not appeared to support his case. The High Court took notice that one of the

concerned officials knew all important facts about the case, who had appeared, therefore, non- appearance of the party was not material. In this case as well ***Sardar Gurbakhsh Singh*** *(supra)* was considered and distinguished and suit of the plaintiff decreed. The above judgment of Calcutta court was considered and approved in ***Snow White Food Product Pvt. Ltd.,*** Vs**.** ***Sohanlal Bagla and others*** (AIR 1964 Calcutta 209) in which in identical circumstances a trusted employee of the company fully conversant with all facts of the case had appeared in a suit for compensation whose testimony was believed.

(xii) ***Arjun Singh*** *Vs*. ***Virendra Nath and an others*** (AIR 1971 Allahabad 29).

This was a case of an adopted son, who was capable of giving evidence, was not produced. An adverse presumption was drawn.

4. Some other Indian Judgments in which the question has been considered are as follows:-

a) ***Abdul Ghafoor and another*** Vs. ***Lala Kunj Behari Lal and another*** (AIR 1957 Allahabad 346).

b) ***Bijoy Kumar Karnani*** Vs. ***Lahori Ram Prasher*** (AIR 1973 Calcutta 465).

c) ***Ramji Jankiji and another*** *Vs.* ***Mauni Baba Kale Kambalwala JaiSiyaram Dasji and others*** (AIR 1978 Patna 48).

d) ***Pandurang Jivaji Apte.*** *Vs.* ***Ramchandra Gangadhar Ashtekar (dead) by LRs. and others*** (AIR 1981Supreme Court 2235).

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(xiii) ***Pioneer Steel Mills Ltd.*** *Vs.* ***M/s Anees Corporation etc.*** (1981 CLC 955).

It was a suit for recovery of price of the goods supplied by the plaintiff to the defendant. In this case defendant No.2 had not come forward to deny the case of plaintiff. It was pressed that an adverse

presumption should be drawn. This was repelled with the observation that there were no special facts within the knowledge of the said defendant, therefore, his non- appearance was not fatal.

(xiv) ***Iqbal Hussain Shah*** *Vs.* ***The State.*** (PLD 1982 Azad J&K S.C.77).

In this case ***Sardar Gurbakhsh Singh*** *(supra)* was relied upon with the observation that the party falling to appear was expected to know the whole controversy but it stayed away.

(xv) ***Syed Abdul Rasheed*** *Vs.* ***Mst. Tajunnisa*** **[**1982 CLC (Karachi) 954**]**.

The learned court drew an adverse inference that non-appearance of the landlady on the ground that the tenant had asserted payment of the disputed months and the landlady had not appeared to controvert it, although she had examined her son as her attorney as well as her husband.

(xvi) ***Muhammad Rafique.*** *Vs.* ***Muhammad*** **[**1989 CLC (Karachi) 1318**]**. DB

It was a case of declaration of title to certain property which was decreed. The defendant in the suit had setup a rival claim in the written statement but he neither appeared nor examined any witness in support of his assertion. Adverse inference was also drawn from the non-appearance of the defendant although the case could have been simply disposed off on the premises that it was a case of no evidence as for as the defense plea is concerned.

(xvii) ***Muhammad Hafeez*** *Vs.* ***Muhammad Haneef Khan and another*** **[**1991 MLD (Lahore) 1576**]**.

In this case also ejectment of petitioner was ordered by the two courts below. The tenant was relying on an agreement to sell. The

learned courts found that the scribe did not know the executant, while respondent No.1/the tenant was known personally. An adverse inference was drawn although it was a case where according to the finding of the learned High Court execution of the disputed documents had not satisfactorily been proved. Therefore the observation of non-appearance of the party appears to be orbiter dicta.

(xviii) ***Mst. Salma Vs. Manzoor Hussain, etc.*** (NLR 1996 Civil 282)

It was case of pre-emption and the plaintiff had not appeared to establish *Talab-e-Muwathibat*.

6. (a) Examination of the above judgments shows that consensus has been firstly that if certain doubts and suspicions are attached to the case of a party, which could be satisfactorily answered only by the said party, then adverse presumption could be drawn against the party who does not appear in the witness box.

(b) That if there are certain facts particularly in the knowledge of the party and the party fails to appear, an adverse presumption could be drawn. Such cases could be of legitimacy, paternity, relationship etc.

(c) However, if a fact could be satisfactorily established by evidence and there are no special features or special facts in the knowledge of the party, then its non-appearance may not be fetal.

However, there could not possibly be any cast iron mould. In fact it might depend on the fact and circumstances of an individual case.