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JUDGMENT SHEET

LAHORE HIGH COURT LAHORE

JUDICIAL DEPARTMENT

Writ Petition No.11458 of 2024

Bagh Ali Versus Addl. District Judge, etc.

J U D G M E N T

Date of Hearing:	18.04.2024
Petitioner by:	Mr. Arshad Ali Chohan, Advocate.
Respondents No.3 and 4 by:	Ch. Tanveer Ahmad Hajra, Advocate. Rana Muhammad Arif, Advocate.

Anwaar Hussain, J. Through this petition, under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner-defendant in a suit for specific performance of agreement to sell, has called into question orders dated 12.10.2023 and 16.01.2024, passed by the Trial Court and the Revisional Court below, respectively, whereby the application of respondents No.3 and 4 (“**the respondents**”) to produce the secondary evidence was allowed.

2. Learned counsel for the petitioner submits that the impugned orders are illegal and unlawful as the Courts below failed to advert to the condition precedent contained in Article 76 of the *Qanun-e-Shahadat* Order, 1984 (“**the QSO**”) relating to seeking permission for leading secondary evidence, which was never adhered to. Adds that neither notice to produce the document(s) under Article 77 of the QSO nor notice to admit or deny the document(s) in terms of Order XII of the Code of Civil Procedure, 1908 (“**CPC**”) was given to the petitioner, therefore, the impugned orders are not sustainable.

3. Conversely, learned counsel for the respondents submit that, even though an application under Article 76 of the QSO is not mandatory, however, the same had been filed as an abundant caution

by the respondents. Add that in order to produce the counsel who issued the document in question (“**the legal notice**”), the respondents/plaintiffs were not required and/or obligated to put the petitioner/defendant on notice and to establish that the original was not available, hence, the Revisional Court has correctly passed the impugned order, which is supported by cogent reasons. Further contends that the respondents have already mentioned the contents of the legal notice in Paragraph No.5 of the plaint and thereafter in the application seeking permission to lead secondary evidence, alongwith the name of the counsel who issued the same and, have also appended the copies of the postal receipts with the plaint, therefore, no notice was required to be served on the petitioner/defendant in terms of Article 77 of the QSO.

4. In rebuttal, learned counsel for the petitioner submits that the application of the respondent was premature and unless the respondents produce the counsel who issued the legal notice, alongwith original postal receipts, the application, which is mandatory for leading secondary evidence, cannot be filed let alone entertained and allowed through impugned orders.

5. Arguments heard. Record perused.

6. This Court is called upon to render its findings in respect of the following legal questions:

- i. Whether a litigant can be permitted to lead secondary evidence, as a matter of right, without the leave of the Court and is not required to submit an application seeking such permission from the Trial Court?
- ii. At which stage of the proceedings a litigant can apply for leading secondary evidence and whether in the facts and circumstances of the case, the Courts below were justified in

allowing the application filed by the respondents?

7. Before answering the legal question, it will be appropriate to examine the law of evidence on the subject. During the course of a civil trial, it is cardinal principle that he who asserts a fact must prove the same, which is based on *latin maxim* “*onus probandi actori incumbit*”. Mode of proof is the procedure by which the “facts in issue” as also “the relevant facts” have to be proved during the trial. Articles 70-89 of the QSO contemplate the applicable rules. The general rule is that a document is to be proved through primary evidence as envisaged in Article 75 of the QSO. The said provision of law obligates that the contents of document must be proved by, bringing on record, primary evidence except the cases provided in the succeeding provisions. Article 74 of the QSO defines the term secondary evidence by providing that secondary evidence, *inter alia*, includes certified copies, copies made from original by mechanical process, copies made from or compared with the original or oral accounts of the contents of a document whereas Article 76 of the QSO contemplates that secondary evidence may be given of the existence, condition or contents of a document in certain cases provided in the said provision of law. Legislative scheme envisaged under the QSO is accommodative of the situations where a litigant is handicapped and/or unable to lead primary evidence for reasons beyond his control, means or capacity and thus can have recourse to Article 76 of the QSO and the circumstances referred thereunder appear to circumscribe letting secondary evidence. It is, *inter alia*, in the absence or incapacity of a party, to a *lis*, giving evidence to tender primary evidence in the circumstances referred to under the provisions of Article 76 of the QSO that right of a party to lead secondary evidence in respect of the document would occasion. This right of a litigant would accrue only in the cases or circumstances

referred to under clauses (a) to (i) of Article 76 of the QSO. The Court seized with the matter is competent to determine whether sufficient grounds have been made out or not for the admission of secondary evidence, which power is to be exercised by the Court keeping in view the parameters and dynamics laid down in Article 76 and the facts and circumstances of each case as secondary evidence is given to prove the existence, condition, or contents of the document and nothing more beyond that. In terms of Article 77 of the QSO, secondary evidence of the contents of a document shall not be allowed unless the party proposing to give such secondary evidence is previously given, to the party in whose possession or power the document is or to his advocate, such notice to produce it as prescribed by the law. For the purpose of present controversy, it is clause (a) of Article 76 of the QSO read with Article 77 thereof, which are relevant and are reproduced hereunder:

“76. Cases in which secondary evidence relating to documents may be given. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:-

(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court; or of any person legally bound to produce it; and when, after the notice mentioned in Article 77, such person does not produce it;

(b).....

.....

In cases (a), (c), (d) and (e), any secondary evidence of the contents of the documents is admissible.

77. Rules as to notice to produce. Secondary evidence of the contents of the documents referred to in Article 76, paragraph (a), shall not be given unless the party proposing to give such secondary evidence has

previously given to the party in whose possession or power the document is, or to his advocate such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case.

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:-

- (1) When the document to be proved is itself a notice;
- (2) When, from the nature of the case, the adverse party must know that he will be required to produce it;

(Emphasis provided)

Clause (a) of Article 76 provides that when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved and when after the notice mentioned in Article 77 such person does not produce it, the litigant has a right to lead the secondary evidence. However, clause (1) of the proviso to Article 77 lays down that such notice is not required to be served when the document to be proved is itself a notice. Similarly, clause (2) of the proviso to Article 77 is also attracted in the present case as the petitioner/defendant from the nature of the case knew that he will be required to produce the legal notice although the petitioner/defendant denied the receipt thereof.

8. Having above elucidation *qua* relevant legal provisions in sight, the legal questions formulated hereinabove are to be answered. It is imperative to observe that although there is tendency as well as prevalent practice of the litigants to file an application for leading secondary evidence, it is always open to a party to lead secondary evidence before the Trial Court, without filing any application for the

reason that upon filing of any such application, one of the two course of actions are adopted by the Courts; either the secondary evidence is not considered or the evidence is considered twice, once for the purpose of “seeking leave/permission of the Court” and then again at the time of admitting the document. In first eventuality, there is possibility of losing an important piece of evidence if the application is dismissed and no appeal is filed and in case of the latter, precious time of the Court is wasted and it achieves nothing. Therefore, the party intending to produce secondary evidence may produce it at the time of recording of evidence, which the opposing party may object to at that time and the Court may decide the objection then and there or the Court may let it be recorded under objection and decide it at the time of final adjudication of the *lis* i.e., at the time of passing the judgment and decree.

9. It is also to be kept in sight that when a trial is initiated, a litigant may have primary evidence of some documents, and secondary evidence of few others. It is for the litigant to decide which of these documents he can best prove and by what evidence. In terms of clause (a) of Article 76, a notice is required to given to the other side to produce an original document in terms of Article 77 but said provision of law also contains certain exceptions as well. One of these exception is envisaged in sub-clause (1) which contemplates that no notice is required “when the documents to be proved is itself a notice”-the legal notice in instant case, or “when, from the nature of the case, the adverse party must know that he will be required to produce it”, which is also the factual position in the present case. Therefore, it is not in every case that a notice under Article 77 is compulsory and no “leave or permission” is required from the Court to lead secondary evidence. While leading evidence, in terms of Order XVIII, CPC, a witness may state that a given document cannot be proved by direct evidence and then proceed to adduce the secondary

evidence in compliance with Article 76 of the QSO and the Trial Court is to consider that evidence, viz., the reason given for not leading the primary evidence and the secondary evidence led and then decide as to whether the secondary evidence led is sufficient and fulfills the mandatory requirements of Article 76 read with Article 77 of the QSO. However, the party, to a *lis*, may choose to file an application seeking permission to lead secondary evidence, which is required to be considered by the Trial Court but the Court cannot insist on filing of an application for any such permission particularly, if a party to the suit has laid foundations of leading secondary evidence, either in the pleadings or while leading the evidence. The secondary evidence cannot be ousted for consideration only because an application for permission to lead secondary evidence was not filed.

10. In view of the preceding discussion, this Court is of the opinion that a party may furnish secondary evidence and filing of an application seeking permission to lead secondary evidence would not be mandatory in every case. However, an application for leading secondary evidence by a party is not precluded. Suffice to observe that since filing of a formal application for leading secondary evidence is not mandatory, the stage at which such an application is filed becomes irrelevant.

11. In present case, the respondents filed the application for the reason that the legal notice issued by their counsel, duly referred (by name) in the plaint of their suit and copies of postal receipts have also been appended with the plaint of the suit instituted by the respondents and the petitioner/defendant has denied the same, therefore, the respondents be allowed to lead secondary evidence of the legal notice. After taking into consideration the facts and circumstances of the case in hand, the Revisional Court below has correctly upheld the decision of the Trial Court, with independent and cogent reasons. Operative

part of the impugned order dated 16.01.2024 passed by the Revisional Court below reads as under:

“8. Having examined the list U/O 7 rule 14 CPC, it reveal that in the first column the respondents disclosed as many as six documents which were appended with the plaint. Column No.1 of the list is very pertinent as it earnestly discloses the intention of the respondents and merely six documents have been disclosed to be attached with the plaint. *It mentions at Sr. No.5 that photocopy of legal notice issued to the defendant has been annexed alongwith original receipts for dispatch of registered covered envelopes of the legal notice. The intention of the respondents was quite manifest from day one. More particularly, when the petitioner being defendant in the suit has already denied the receipt of the legal notice for which the original receipts of postal service are also available with the respondents. The respondents should have the fair opportunity to prove their stance in the shape of secondary evidence and necessary permission was sought by the learned trial court.*”

(Emphasis supplied)

This Court endorses the opinion of the Courts below. The respondents made out a *prima facie* case to lead secondary evidence and the prior notice in terms of Article 77 of the QSO was not required as envisaged under clause (1) thereof as the document intended to be produced itself is a notice. Cases reported as “Muhammad Khan and 9 others v. Ameer Khan Gaddi Balloch” (2008 YLR 296); “Altaf Hussain Shah and another v. Abdul Qadeer and 2 others” (PLJ 2004 Lahore 579) and “Liaqat Ali v. Muzaffar Khan and another” (2003 YLR 1899) are referred in this regard. Needless to observe that mere admission of a document in evidence and making exhibit thereof does not prove it automatically and/or does not attest to its authenticity, truthfulness or genuineness, which will have to be established during the course of the trial, in accordance with law.

W.P. No.11458 of 2024

12. In view of the above discussion, the present constitutional petition has no merits, hence, the same is **dismissed**. No order as to costs.

(ANWAAR HUSSAIN)
JUDGE

Approved for reporting

Judge

Maqsood