JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

WRIT PETITION NO. 2794 OF 2020

Mehmood Alam Sher
Vs.
HEC and others

Petitioner by	**:**	**Mr. Riaz Hussain Azam Bopara & Umar Farooq Malana.**
Respondent by	**:**	**Mr. Binyamin Abbasi.**
Date of Hearing	**:**	**15.03.2022.**

SAMAN RAFAT IMTIAZ, J.:- Through the instant petition, the Petitioner (Mehmood Alam Sher) has challenged the Judgment dated 13.11.2019 ("**Impugned Judgment**") passed by learned Additional District Judge-X, West-Islamabad ("**Appellate Court**"), whereby appeal against Judgment and Decree dated 09.03.2019 passed by learned Civil Judge, West-Islamabad has been dismissed.

2. The pertinent facts as per the Memo of Petition are that the Respondent No. 1 [**HEC]** invited applications for grant of scholarship under the overseas scholarship program for M.S/M.Phil leading to PhD in France. The Appellant applied for the same and was selected. Thereafter, the Petitioner and the Respondent No. 1executed the Deed of Agreement for Undertaking a Course of Studies Scholarship Under (Overseas Scholarship for MS/ MPhil Leading to PhD in Selected Field Phase-II) dated 13.03.2007 (**"Deed of Agreement"**). It was further stated that the Petitioner completed his M.S/M.Phil as per the terms and conditions of the Deed of Agreement and also secured admission in PhD but was compelled to drop out due to Respondent No.1's alleged breach of contract.

Case History

3. The Respondent No. 1 filed and instituted a Suit for Recovery of Rs. 2,216,135/- before the Court of Senior Civil Judge, Islamabad alleging therein that the Petitioner violated the terms and conditions of the Deed of Agreement by returning to Pakistan without completing his PhD after M.S therefore, his scholarship was cancelled. The Respondent No. 1 claimed that the Petitioner was liable to refund the amount spent by the Respondent No. 1 on the Petitioner's studies as a result of such cancellation of scholarship as per the terms of the Deed of Agreement. Since the Petitioner did not refund the amount, the Respondent No. 1 filed the suit against him.

4. The Petitioner filed his Written Statement before the Trial Court alleging therein that the Respondent No. 1 approached the Court with unclean hands as the contract between the parties was for the Petitioner to gain higher education in France subject to provisioning of financial aid. He alleged that he was unable to complete his PhD due to the Respondent No.1's breach of the Deed of Agreement as they did not make requisite payments in a timely manner which left the Petitioner no choice but to leave France without completing his PhD as he could not maintain himself without the grant from the Respondent No. 1.

Trial Court Judgment & Decree

5. The Trial Court, after framing issues and recording evidence, rendered the Judgment & Decree dated 09.03.2019, whereby the Respondent No. 1's suit was decreed. In short, the reasoning given was that the Petitioner was unable to satisfy the Trial Court that delayed payments by the Respondent No. 1 was the cause for the Petitioner to quit his studies. It was also observed that the Petitioner admitted his liability to refund the amount vide letter dated 12-06-2010 (Ex-P-6), which according to the learned Trial Court proved the Respondent No. 1's claim in addition to the fact that the Petitioner was unable to show that out of hundreds of other scholars anyone else also suffered on account of late payments by the Respondent No. 1.

Impugned Judgment

6. The Petitioner filed an appeal before the Appellate Court which was dismissed vide the Impugned Judgment. The Impugned Judgment firstly noted that it was an admitted fact that under the terms of the Deed of Agreement the Petitioner was required to complete the PhD within the stipulated period of time despite which he chose to return to Pakistan without completing his education. Further, the learned Appellate Court noted that on one hand the Petitioner submitted that he was unable to meet his day to day expenses due to late payments by the Respondent No. 1 on the other hand he requested the Respondent No. 1 to allow him to repay in installments. Moreover, that emails exchanged between the parties showed that the Petitioner was warned not to quit his studies otherwise he would be liable for refund and that he was repeatedly asked to send requisite documentation for reimbursement but that he did not pay heed. The Impugned Judgment recorded that the Petitioner was unable to prove that the Respondent No. 1 breached the Deed of Agreement as he admitted during cross-examination that he received stipend for the month of January, 2009. For all the foregoing reasons, the Petitioner's appeal was dismissed, hence the instant petition.

Arguments

7. Learned counsel for the Petitioner, *inter alia*, contended that the suit of Respondent No. 1 is in violation of terms and conditions of the Deed of Agreement; that the Petitioner completed his M.S/M.Phil degree and therefore, the Respondent No. 1 cannot claim refund of fees for the same; that in any event, he was unable to complete his PhD due to the Respondent No. 1's own breach therefore they are not entitled to claim refund, which fact has been ignored by the learned Courts below; that the learned Trial Court has wrongly decreed the suit against the Petitioner and the appeal has been dismissed on the basis of misreading and non-reading of evidence, presumptions, suppositions and technicalities, against the principles of natural justice, which has resulted in miscarriage of justice and as such it was prayed that the Impugned Judgment may be set aside.

8. On the other hand, learned counsel for Respondent No. 1 vehemently opposed the stance of the Petitioner and asserted that the claim of the Petitioner is absolutely false; that the Petitioner has violated the terms and conditions of the Deed of Agreement by failing to complete his PhD; that he returned to Pakistan and expressed his unwillingness to complete the degree, therefore his scholarship has been cancelled and he was asked to refund the amount, which was squarely within the terms agreed upon vide the Deed of Agreement. Learned counsel for Respondent No. 1 has relied upon the cases of *United Bank Ltd Vs. Shoaib Ahmed and 5 others,* PLD 2021 Sindh 394, *Muhammad Iftikhar Vs. Nazakat Ali,* 2010 SCMR 1868, *Haji Fazal Ghani Vs. Fazle Ahad and 4 others,* 2021 YLR 1055, *Lahore Cantt Coopertive Housing Society ltd Vs. ADJ, Lahore and 3 others,* 2003 YLR 1224, *Amjad Khan Vs. Muhammad Irshad (deceased) through LRs,* 2020 SCMR 2155, *Naik Muhammad Vs. Muhammad Shabbir and others,* 2019 CLC 164, *Attiq ur Rehman through real father and another Vs. Muhammad Amin,* PLD 2006 Supreme Court 309, *Muhammad Sarwar and others Vs. Hashmal Khan and others,* PLD 2022 Supreme Court 13 and *Ahmad Nawaz Khan Vs. Muhammad Jaffar Khan and others*, 2010 SCMR 984. Learned counsel for Respondent No. 1 has prayed for dismissal of the instant petition on behalf of the Respondent No. 1.

9. I have heard the arguments and perused the record.

Scope of Constitutional Jurisdiction

10. First and foremost, it has to be borne in mind that the Petitioner has invoked this Court's Constitutional jurisdiction, which is extraordinary and discretionary in nature. It is settled law that a party approaching the High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") has to demonstrate that there is a gross misreading or non-reading of evidence or jurisdictional error or such legal infirmity that has caused miscarriage of justice. Interference by the High Court may be called for if findings are based on misreading or non-reading of evidence, erroneous assumption of facts, misapplication of law, excess or abuse of jurisdiction and/or arbitrary exercise of

powers. It is therefore to be seen whether this case is of such exceptional nature so as to compel this Court to exercise its discretionary jurisdiction.

Whether completion of M.S/M.Phil degree by the Petitioner disentitles the Respondent No. 1 from claiming refund for the same?

11. The first argument of the Petitioner is taken up for consideration that since he completed his M.S/M.Phil degree, the Respondent No. 1 cannot claim refund of fees for the same. Perusal of the Impugned Judgment shows that this aspect has not been considered. The relevant terms of the Deed of Agreement produced as Exb-P-1 are reproduced herein below:

> *"Whereas Mr. Mahmood Alam Sher has been* selected by the Higher Education Commission for the award of Scholarship for PhD studies under the Scheme "Overseas **Scholarship for MS/MPhil leading to PhD** in Selected Field Phase-II" and the scholar has agreed to accept the same on the terms and conditions governing this scholarship award.
>
> *i. The scholarship award is initially valid for a period of one year and would be extendable periodically to a maximum of 4 years in case of Masters leading to PhD, while in case of PhD up to 3 years only, subject to the satisfactory performance of your studies. 5th year extension in case of Masters leading to PhD and 4th year extension in case of PhD will be allowed on case to case basis upon recommendation of supervisor, NUFFIC and HEC agrees to it.*
> ***ii. The payment of allowances admissible under the scholarship program shall be made subject to the complete adherence to all rules and regulations governing the scholarship program as well as satisfactory performance in the authorized studies.***
> *iii. The scholar shall not change the specified course of' studies nor register himself/herself for any other course or program without prior approval of the HEC.*
> *iv. The scholar shall not extend the specified period of studies without prior approval of the HEC.*
> *v. The scholar shall not undertake employment whether paid or otherwise without approval of the HEC during his/her course of studies abroad.*
> *vi. The scholar shall refrain from engaging himself/herself in any political, commercial or any other activity incompatible with his/her program of studies abroad.*
> ***vii. In case the scholar fails to qualify the course for which he/she was awarded Scholarship, the HEC reserves the right to recover entire expenditure inclusive of travel cost from the Scholars/Guarantor.***
> *viii. The scholar shall return to Pakistan immediately after the completion of the approved course for which he/she was sent abroad, and shall serve in Pakistan/his parent department for a period of five years as may be prescribed."* [Emphasis added].

12. The recital of the Deed of Agreement shows that scholarship awarded to the Petitioner was for 'MS/M.Phil leading to PhD'. In answer to a question during

cross-examination, the Respondent No. 1's authorized representative explained that the Petitioner was sent for 'M.S leading to PhD' which could not be separated. No evidence to the contrary is available on the record. Clause (vii) of the Deed of Agreement clearly provides that in case the Petitioner failed to qualify the course for which he was awarded the scholarship, Respondent No. 1 would be entitled to recover the entire expenditure including travel cost from the Petitioner.

13. The above quoted terms of Deed of Agreement read in light of Respondent No. 1's representative's explanation, which remained unchallenged lead me to conclude that the Petitioner's contention that the expenses related to the Master's degree could not be recovered from him as he had completed the same is untenable. The scholarship granted to the Petitioner was not just for M.S/M.Phil but was for 'M.S/M.Phil leading to PhD'. Therefore, under the terms of the Deed the Respondent No. 1 was entitled to recover the entire expenditure including travel cost from the Petitioner in case of his failure to complete his PhD.

Whether the Respondent No. 1's breach of the Deed of Agreement disentitles it from claiming refund?

14. This brings me to the next argument of the Petitioner that the Courts below failed to take into account that the Petitioner's failure to complete the course for which he was granted scholarship was on account of the Respondent No. 1's own breach of the Deed of Agreement i.e. that the Respondent No. 1 failed to make available the requisite finances in a timely manner in which case the Respondent No. 1 was not entitled to invoke clause (vii) of the Deed of Agreement.

15. In other words the contention of the Petitioner is that he could not perform and was absolved of performance given the Respondent No. 1's breach of the terms of the Deed of Agreement. This proposition is covered by Sections 51 and 52 of the Contract Act, 1872 (**"Contract Act"**), which provide as follows:

> ***"51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.*** *When a contract consists of reciprocal promises to be simultaneously*

> *performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.*
>
> ***52. Order of performance of reciprocal promises**. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order, and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires."*

16. Perusal of the Deed of Agreement shows that it comprised of reciprocal promises. While clause (ii) of the Deed makes performance by the Respondent No. 1 conditional upon the due adherence of the terms and conditions by the Petitioner explicitly, the Respondent No. 1's obligation to make available scholarship funds to the Petitioner in order for the latter to carry out his legal obligations under the Deed is very much implicit in the contract. The order of performance required by the nature of the transaction is for Respondent No. 1 to make available the requisite funds first. Therefore it was imperative for both the Courts below to first consider whether the Respondent No. 1 was in breach of its obligations or not and in case there was a breach on the part of the Respondent No. 1 then the effect thereof in light of Sections 51 and 52 of the Contract Act.

17. On the contrary, there is no discussion or findings given in the Impugned Judgment or the judgment of the learned Trial Court as to whether or not the Respondent No. 1 was in breach as alleged and if so the effect of such breach. Instead the conclusion reached by the concurrent judgments of the Courts below is that the Petitioner was unable to prove that his failure to continue his PhD was the result of the Respondent No. 1's breach.

18. In doing so both the Courts below have shifted the burden of proof upon the Petitioner despite the fact that Respondent No. 1 had not discharged its burden of proof. The suit for recovery was filed by the Respondent No.1 and as such there is no cavil to the proposition that the initial burden of proof lay upon the Respondent No.1. However, the Impugned Judgment as well as the judgment of the learned Trial Court is devoid of any discussion evaluating the evidence submitted by the Respondent No. 1.

19. The record before this Court reflects that the Respondent No.1's authorized representative stated in his cross-examination that Respondent No.1 would send money for all the scholars for the entire year to Respondent No.1's partner agency in France i.e. SFERE who would release the money to the scholars in France on monthly basis. Despite the foregoing statement, he admitted that Respondent No.1 did not have any record of payment by SFERE to the Petitioner. This important statement has escaped the notice of both the Courts below.

20. The Respondent No. 1's authorized representative relied upon Ex-P/8 comprising of 58 pages however, perusal of Ex-P/8 shows that only 9 pages are attached with the instant petition. Be that as it may, the first page is a ledger which is a self-generated document that does not contain any confirmation of receipt from the Petitioner. In respect of the Local Language Course Stipend as mentioned in the ledger, a copy of cheque No.2310730 dated 26.04.2007 in favour of the Petitioner is available as part of Ex-P/8 along with a ledger bearing signature of the Petitioner comprising receipt of the said cheque. However, the said cheque is only for an amount of Rs.35,500/-. There is another ledger purportedly showing travel expenses of various scholars in which Petitioner's name appears at Serial No.40 showing an amount of Rs.26,270/- however, there is no confirmation of receipt available against such amount. As noted above, the complete Ex-P/8 is not before this Court. The Courts below should have examined whether the entries contained in the ledger on the first page of the said Exhibit aggregating to the amount claimed by the Respondent No. 1 are established from the supporting documents however, the Impugned Judgments do not contain any such analysis.

21. The Courts below have not considered that on one hand the aforementioned ledger on the first page of Ex-P/8 shows various expenses allegedly incurred on the studies of the Petitioner on 20-08-2007; 08-10-2008; 02-02-2009; 20-03-2009; 30-04-2009, and 07-10-2010 whereas on the other hand the Respondent No.1's own representative admitted in his cross-examination that according to Respondent No.1's records, the last payment was made to the Petitioner in October, 2008,

thereby contradicting the entries of the aforementioned ledger to the extent of the months after October, 2008. Despite the foregoing contradictions, no findings reconciling the same are contained in the judgments of the lower Court.

22. The entries in such ledger for the payments allegedly made in February, 2009; March, 2009; April, 2009; and October, 2010 are made all the more doubtful because of the admission on cross-examination that according to the Respondent No. 1's own records, the Petitioner had returned to Pakistan on January 17, 2009. Indeed such payments were denied by the Petitioner on cross-examination. Due to the incomplete record before this Court, I am unable to conclude as to whether or not proof of receipt of such payments by the Petitioner was produced by the Respondent No. 1. However, the aforementioned inconsistencies should have been addressed by the Courts below.

23. The Respondent No.1's representative further admitted that the Applicant was not permitted to take up a job in France. He also admitted that the Petitioner had informed Respondent No.1 in January, 2009 that he had not received payment and that in response Respondent No.1 had assured the Petitioner that the amount would be released soon. The Respondent No. 1 produced email dated 10-01-2009 as Mark 'B' which was admittedly received by the Petitioner and shows that Respondent No. 1 acknowledged the delay in maintenance allowance of January, 2009 and assured to transfer the same on priority basis. However, it was specifically admitted by the Respondent No.1's representative on cross-examination that Respondent No. 1 has no record of any payment between October, 2008 and January, 2009. These admissions lend credence to the claim of the Petitioner that he had no choice but to leave France in January, 2009. Yet these aspects have not been taken into consideration in the Impugned Judgment or the judgment passed by the learned Trial Court.

24. It is also observed that the learned Appellate Court noted that the Petitioner admitted receipt of the stipend for the month of January, 2009. However,

examination of such portion of the Petitioner's cross-examination shows that it states in Urdu which translates as:

> *"It is incorrect that the January, 2009 stipend was not received. It is incorrect that I had received stipend in January, 2009".*

Given that two apparently contradictory statements have been recorded, the one which is in line with the pleadings and the rest of the evidence produced by the Petitioner would have to be considered.

25. Both the lower Courts also stressed on the Petitioner's alleged failure to prove that any other student out of hundreds of scholars was inconvenienced in the same manner as the Petitioner due to the late payments by the Respondent No. 1 even though it was the Respondent No. 1's burden to prove that its payments were timely made.

26. Much was made by the learned Courts below about the letter the Petitioner wrote to the Respondent No. 1 produced as Ex-P-6, whereby he requested that he be allowed to return the money vide installments. This letter has been taken as an admission of liability. However, neither Court took into consideration the Petitioner's statement that the request was made in an effort to settle the matter to avoid going to court.

27. The above analysis of the record before this Court makes it abundantly clear that the Impugned Judgment suffers from serious misreading and non-reading of evidence.

28. Here I would like to recall the scope of the jurisdiction of this Court under Article 199 of the Constitution as explained in the case of *Pakistan Sugar Mills Association (PSMA), Islamabad Versus Federation of Pakistan through Secretary, Cabinet Division, Islamabad*, PLD 2021 Islamabad 55:

> *"66. This Court will not issue a writ if equitable considerations do not permit it. The jurisdiction of this Court under Article 199 of the Constitution is extraordinary, discretionary and equitable in nature and is to be exercised in the larger interest of justice. While exercising this jurisdiction, the facts and circumstances of the case*

> *should be seen in their entirety to find out if there is miscarriage of justice. It can be exercised ex debito justitiae, i.e. to meet the ends of justice. While exercising writ jurisdiction, the High Court not only acts as a Court of law but also as a Court of equity. It is, therefore, the duty of this Court to ensure that it exercises jurisdiction to advance the ends of justice and uproot injustice.* ***In exercise of this jurisdiction, this Court will intervene where justice, equity and good conscience require such intervention.****"* [Emphasis added].

29. Keeping such settled principles of law in view and on the basis of the misreading and non-reading of evidence and misapplication of law as highlighted above, I am of the considered view that the Impugned Judgment does not serve the cause of justice. As such the matter does indeed warrant interference by this Court in order to avoid miscarriage of justice.

30. At the same time, it is also noted that the entire evidence is not before this Court. In the cases of *Chairman, Wapda, Lahore versus Gulbatkhan*, 1996 PLC (C.S) 376 and *Muhammad Darvaish Al-Gilani versus Muhammad Sharif*, 1997 SCMR 524, the Honorable Supreme Court held that where the evidence is not sufficient to pronounce judgment or decide issues between the parties, the case should be remanded. Therefore, this is a fit case for remand.

Admissibility of printouts of emails

31. Before concluding however, there is another aspect of this case, which merits discussion. It is noted that the learned Trial Court did not accept into evidence the emails relied upon by both the parties. Despite the fact that no objection has been recorded the emails submitted by the parties have been marked and no reason has been given in the Impugned Judgments as to why they were not exhibited (yet they have been relied upon to reach the Impugned Judgment). Clearly, neither of the two learned Courts below took into consideration the provisions of Articles 73, 78-A, and 164 of the Qanoon-e- Shahadat Order, 1984 or Section 3 of the Electronics Transactions Ordinance, 2002.

32. Before looking at the admissibility of emails in particular, I would like to quote the following passage from the case of *Ali Haider alias Papu versus Jameel*

Hussain and others, PLD 2021 SC 362 to serve as a general introduction with regard to admissibility of evidence that becomes available due to technological advancement:

> *"4. Before analyzing the circumstantial evidence, it might be useful to underline the role of science, modern forensic techniques and devices under our criminal justice system.* ***For the law to serve people in this technologically complex society, courts need to understand and be open to science and its principles, tools and techniques.*** *Legal decisions of the courts must fall within the boundaries of scientifically sound knowledge. A judge and more so a trial judge, acts as a gatekeeper of the scientific evidence and must, therefore, enjoy a good sense and understanding of science.* ***As science grows so will the forensic techniques, tools and devices; therefore, courts must be open to developments in forensic science and embrace new techniques and devices to resolve a dispute,*** *provided the said technique and device is well established and widely accepted in the scientific community as a credible and reliable technique or device.* ***Article 164 of the Qanun-e-Shahadat Order, 1984 (QSO) is our gateway allowing modern forensic science to come into our courtrooms. Article 164 provides that courts may allow to be produced any evidence that may have become available because of modern devices and techniques.****"* [Emphasis added].

33. We live in a global village in which thanks to technology newer and faster ways of communication have been changing our lives in every aspect including the way we exchange correspondence. Electronic mails or "emails" as they are known in common parlance, have been in vogue since the advent of the internet. They are the electronic equivalent of a letter and have become a regular feature whether it is in respect of business affairs, commercial transactions, general official communication or even personal matters. In my view it can safely be concluded that emails are here to stay as an everyday means of communication unless superseded by more advanced technology.

34. Indeed in many instances emails serve as the primary mode and often times are the only medium of communication in commercial/official/personal transactions and dealings. In such cases, more traditional forms of evidence regarding agreements, understandings, and other communication between people may not be available. Regardless of whether courts admit emails into evidence,

dependence on them for communication is unlikely to wane in which case the only outcome of denying admissibility will be disputes that remain unresolved due to lack of evidence or in other cases miscarriage of justice. The instant matter is a case in point where the bulk of the evidence available for the Court to decide which party was in breach of the terms of the Deed of Agreement was in the form of emails.

35. Fortunately, there is no need to shun such evidence as the Legislature in keeping with the times has already introduced specific changes in the law which can be relied upon by Courts in order to admit newer forms of evidence which become available as a result of technological advancements including emails.

36. Article 164 of the Qanoon-e- Shahadat Order, 1984 is reproduced herein below, which in the words used by the Honorable Supreme Court in *Ali Haider (Supra)*, is indeed our 'gateway' that allows modern technology into our courtrooms:

> *"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."*

37. More specifically Section 3 of the Electronic Transactions Ordinance, 2002 (ETO, 2002) and Article 73 of the Qanoon-e- Shahadat Order, 1984 provide assistance with regard to emails and are therefore reproduced herein below:

Electronic Transactions Ordinance, 2002

> ***"3. Legal recognition of electronic forms.****-No document, record, information, communication or transaction shall be denied legal recognition, admissibility, effect, validity proof or enforceability on the ground that it is in electronic form and has not been attested by any witness."*

Qanoon-e- Shahadat Order, 1984

> *"73.* ***Primary evidence.*** *Primary evidence means the document itself produced for the inspection of the Court.*

Explanation 1.-- Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.--Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Explanation 3.-- A printout or other form of output of an automated information system shall not be denied the status of primary evidence solely for the reason that it was generated, sent, received or stored in electronic form if the automated information system was in working order at all material times and, for the purposes hereof, in the absence of evidence to the contrary, it shall be presumed that the automated information system was in working order at all material times.

Explanation 4.-- A printout or other form of reproduction of an electronic document, other than a document mentioned in Explanation 3 above, first generated, sent, received or stored in electronic form, shall be treated as primary evidence where a security procedure was applied thereto at the time it was generated, sent, received or stored." [Emphasis added].

38. Section 3 of the ETO, 2002 ensures that documents, records, information, communications or transactions in electronic form cannot be denied, *inter alia*, legal recognition or admissibility. Whereas, printouts of an automated information system have been accorded the status of primary evidence by virtue of Explanations 3 and 4 added to Article 73 of the Qanoon-e- Shahadat Order, 1984 by way of the ETO, 2002 subject to certain conditions as stipulated therein.

39. The terms "electronic", "automated", "information" and "information system" have been defined in the ETO, 2002 as follows:

*"**electronic**" includes electrical, digital, magnetic, optical, biometric, electro-chemical, wireless or electromagnetic technology."*

*"**automated**" means without active human intervention."*

*"**information**" includes text, message, data, voice, sound, database, video. Signals, software, computer programs, codes including object code and source code."*

> *"**information system**" means an electronic system for creating, generating, sending, receiving, storing, reproducing, displaying, recording or processing information."*

40. A combined reading of such definitions leads me to conclude that a printout of an email, being the output of a digital system created for generating, sending, receiving, storing, reproducing, displaying, recording, processing messages without active human intervention, constitutes primary evidence pursuant to Article 73 of the Qanoon-e- Shahadat Order, 1984 except where the automated information system is proved not to have been in working condition at material times. However, the latter is to be presumed unless proven otherwise due to which the onus to prove that the information system was not in working condition at material times would fall upon the party denying the email.

41. Without prejudice to the foregoing, it must be borne in mind that admissibility of evidence and authenticity thereof are two separate matters and distinct requirements. Mere admissibility into evidence of a document does not automatically mean that contents thereof stand proved, authenticated or admitted by the other side. However, in that way emails are no different from any other type of correspondence. An email purportedly sent by one party to another may be admitted into evidence however, in case of denial of receipt or dispatch by the other side the party relying upon it would be required to prove its receipt/ dispatch in much the same way as any other document admitted into evidence but denied by the opposing party. In the event of failure to prove receipt or dispatch, as the case may be, the Court would be at liberty to draw any inference as deemed appropriate under the facts and circumstances of each case.

42. The difference between admissibility and authentication and the manner of authentication of emails was ably discussed by the Honorable Sindh High Court in the case of *Taimoor Mirza versus Maliha Hussain*, 2020 CLC 1029 and certain guidelines were provided as follows:

> *"10. ……In fact**, email is a form of documentary evidence and the same can be admitted as evidence in court in the same way as other forms***

of documentary evidence. However, the reliability of such email will always be a question and the same will be subject to scrutiny. *An email can be produced as a document in shape of hard-copy i.e. printout, but one may not consider an email or other form of electronic text message as a 'smoking gun' in favour of his case. This can be a particular issue and measures should be taken to protect the integrity and authenticity of email by digital signature (if available) and encryption etc. and insuring that the same should be available in his inbox or transferred to some other mailbox in his email account so that its genuineness can be established in case of denial.* ***The major evidentiary issue for a trial judge arises in respect of a private digital communication to reach at a conclusion that the texts of electronic document were genuinely written by the other party or not. Besides getting some technical and expert assistance, a judge can overcome this problem of authentication of an e-mail or text message through different ways, which are;***

i) the adverse party admits that the texts were written by him.

ii) a witness may come in witness box and say that he saw the message created.

iii) characteristic of the message itself speaks that it was created by the author for whom it is claimed as author of the same.

iv) circumstances of the case proof that it was created as claimed.

v) a 'reply authentication' specially for e-mail, i.e. an electronic reply showing both parties e-mail addresses and text messages clearly indicating that the same was sent in response to the text message that was initially sent.

11. ***Nevertheless, reliability of email or other electronically generated documents may be subject to attack but a party cannot be restrained to present it in the Court as a documentary evidence.*** *As far as confrontation to a witness during cross-examination is concerned, in view of the above discussion, the same is also allowed if emails or other digital documents are generated or originated by the witness, who is facing cross-examination or on his behalf."*

43. In addition to the ways of authentication listed in *Taimoor Mirza (Supra)*, a learned Division Bench of the Honorable Sindh High Court in the case of *Qurban Ali and another versus The State* ,2007 P.Cr.L.J. 675, observed that the computer that sent an email can be identified by the sender's IP address in the following words:

"32. There are several free software tools available on Internet which can trace back the IP Address of the Sender through the header text of the E-mail received. ***After getting the IP of the sender, the concerned ISP can be contacted to get***

> ***further information (i.e. the telephone line which was used by the IP at that particular date and time of the E-mail sent). The address of the telephone holder/owner can obtained from PTCL/NTC. In this way the E-mail sending computer can be identified and the data of the E-mail can be retrieved from it by using Computer Forensics Tools.*** *It is also possible to prove it in Court of Law provided proper chain of custody of maintained. However, it is difficult to identify the particular person who sent the E-mail; this is the area where investigation by some police agency is required. There is no law by which Cyber Cafes are required to keep record of persons using the computer of cafes, therefore, Cyber Cafes do not keep record of the persons using computers there, nor do they keep history of data for long.*

44. In short, a printout of an email would be admissible as primary evidence by virtue of Article 73 of the Qanoon-e- Shahadat Order, 1984 subject to the conditions stipulated therein. However, once admitted into evidence, the emails may require authentication unless admitted by the other side. The different ways of authentication may be summarized as follows with caution that this by no means serves as an exhaustive list as other ways may be employed depending on the facts and circumstances of each case:

1. Admission by the other side;
2. Tracing the IP address of the sender;
3. Reply from the other side or conduct that shows receipt or dispatch of disputed email;
4. A read receipt; or
5. Witnesses who may be other recipients of the disputed email.

45. In view of the above discussion, my humble view is that printouts of emails produced by the parties should have been admitted into evidence and exhibited. There is nothing on the record to suggest that either of the parties denied the dispatch and/or receipt of the emails produced by the other side in which case reliance upon the same was also justified.

Conclusion

46. For all the foregoing, reasons, the instant petition is **allowed** and the Impugned Judgment is set aside and matter is remanded to the learned Trial Court to rewrite the judgment in light of the observations contained herein above. The

learned Trial Court shall take into consideration all the evidence on the record but particularly the pages of Ex-P/8, which are not before this Court. After due appraisal of all the evidence, the learned Trial Court shall decide whether or not the Respondent No. 1 was in breach of its obligations under the Deed of Agreement and if so, the effect of such breach on the Respondent No. 1's claim keeping in view Sections 51 and 52 of the Contract Act. The judgment will be rewritten after evaluating the evidence of both the parties. The Trial Court shall conclude the matter within two months from the date of this Order.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in the open Court on 22.04.2022.

JUDGE

Approved for Reporting
Blue Slip added.