

IN THE HIGH COURT OF SINDH AT KARACHI

HCA No. 237 of 2017

Before : **Mr. Justice Irfan Saadat Khan**
Mr. Justice Fahim Ahmed Siddiqui

M/s. Karachi Water & Sewerage Board. Appellant.

Versus

Daim Khan sole proprietor of
M/s Amir Khalil Builders. Respondent.

Dates of hearing : 08.10.2019 & 09.12.2019

Date of judgment: : _____

Appellant M/s. Karachi Water & Sewerage Board through Mr. Sameer Ghazanfar, advocate.

Respondent Daim Khan sole proprietor of M/s. Amir Khalil Builders through Mr. Tanveer Ahmed, advocate

J U D G M E N T

FAHIM AHMED SIDDIQUI, J:- Through the instant High

Court Appeal, the appellant has impugned the judgment passed on 17.02.2017 and decree drawn on 28.02.2017 in Suit No. 226/1998, whereby the Suit filed by the respondent was decreed with 6% interest and cost.

2. The brief facts, as ascertainable from the impugned judgment and other records, are that the respondent (plaintiff of the aforementioned Suit) is a contractor by profession and the sole proprietor of M/s. Amir Khalil Builders, which was duly approved by the appellant. The appellant assigned five different jobs to the respondent for which the appellant

issued a work order in favour of the respondent through a letter No. EE/WD/DIV/LY/111/96 dated 23.05.1996. These jobs were allegedly completed by the respondent and recorded in the relevant books of the respondent, while inspection of each assigned job was also carried out by a team comprising high officials of the appellant and a report was furnished to the appellant by the inspection team. According to the findings of the inspection report, the respondent calculated the payable amount for each job separately. The accumulated cost of all the jobs as per rate quoted by the respondent was worked out by him on the basis of the said inspection, which runs to a tune of Rs. 86,30,078/- and payable to the respondent. The respondent approached the appellant for the payment of the amount due but in spite of repeated requests, the appellant did not pay the aforementioned amount to the respondent. Subsequently, the respondent sent a legal notice to the appellant dated 16.12.1997, which was also not responded by the appellant. Ultimately, the respondent filed the aforementioned Suit, which was decided in his favour through the impugned judgment and decree.

3. We have heard the learned advocates of the parties and scanned the relevant record in the light of their valued submissions.

4. Mr. Sameer Ghazanfar, the learned counsel for the appellant, has assailed the impugned judgment from different corners. According to him, the learned Single Judge could not assimilate the fact that the contents of the plaint were fully rebutted in the Written Statement filed by the appellant. He submits that there was a specific denial of the contents of paragraph-3 of the plaint, as such it was wrongly held by the learned Single Judge that there was no denial regarding Issue No. 1. According to him, the finding of the learned Single Judge regarding issuance of the work order is incorrect and in fact, no work order was issued because of the non-availability of funds and this fact is also mentioned in paragraph-4

of the written statement. He further contends that the reliance on inspection report cannot be made, as the same is the copy of a note sheet, which was an internal document. He submits that the respondent/plaintiff in his evidence has produced the photocopies and being secondary evidence the same cannot be relied upon being inadmissible. According to him, when there was a specific denial by the appellant in Written Statement and his witness also denied the inspection report being an internal document, it would be appropriate that the Suit of the respondent/plaintiff should have been dismissed. He submits that the Suit of the respondent was liable for dismissal as the respondent could not give physique to his case on the basis of secondary evidence. He further submits that the very vital piece of evidence was missing i.e. agreement/contract of the work and in absence of the same, no decree could be passed in favour of the respondent. He submits that the executive engineer and other officials have given obliging statement as such the same may not be considered. In response to a query, he submits that no action was taken against the officials, who appeared and deposed in the instant matter.

5. Mr. Tanveer Ahmed, the learned counsel for the respondent prefers his submission in a concise manner. According to him, the only denial in Written Statement was not sufficient but there must be a specific denial with complete details on each and every allegation in the plaint. He submits that certain aspects have not been properly denied in the Written Statement filed by the appellant before the learned Single Judge, which definitely and rightly held against them by the learned Single Judge. He draws attention to the fact that the two officials of the appellant were called by the Court on the request of the respondent and they admitted the documents produced by the respondent. He submits that the appellant has not taken any action against those officials; as such no adverse inference can be draw regarding their depositions. In the end, he submits

that he supports the impugned judgment and no slightest variation or modification is needed in the same.

6. After hearing the arguments and going through the record, we are of the view that the whole of the controversy between the parties hinges on the following points.

- a) Whether there was not a specific denial of alleged facts in Written Statement, and if so what will be its effect?
- b) Whether non-production of Contract/Agreement and production of photocopies of certain documents specially Work Order and Inspection Report were fatal for the respondent's case?

7. We consider that a detailed deliberation on these points will be sufficient to resolve the dispute between the parties, hence we propose to address the same in the following manner :-

Point No. 1

8. The learned counsel for the appellant has strongly controverted the observation of the learned Single Judge regarding non-denial of the issuance of work order and assignment of jobs to the respondent. The respondent has raised this issue in paragraph-3 of his plaint in the Suit. The entire case of the respondent is based on that paragraph and there is only one line denial by the appellant in the said Written Statement. In paragraph-3 of the plaint, the respondent has described the assignment of jobs and in five sub-paragraphs he clearly mentioned each job separately. He also disclosed the inspection carried out by the appellant and also stated the amount so calculated on the basis of such inspection report submitted by the inspection committee to the higher-ups of the appellant. In our view, the entire case of the respondent rests on this important

paragraph. Nevertheless, the appellant at the time of filing Written Statement has admitted the assignment of work with a denial of its execution but he remained silent about the inspection report. What is more, he admitted the issuance of Work Order but nowhere it is mentioned when and how the said work order was revoked. We are of the view that this denial was not a specific denial rather in the said portion of Written Statement, the appellant has admitted about the assignment of work and issuance of the work order. We are of the view that silence of the appellant in their Written Statement speaks volumes regarding the inspection carried out by their officials and submission of 'Inspection Report'.

9. Since the appellant has not denied the allegations of inspection and furnishing report mentioned by the respondent in the plaint of suit, as no substance could be brought on record during the cross-examination in this respect. As per Order VIII Rule 5 of CPC, every allegation or fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. In the instant case, nothing was mentioned about the recalling of the Work Order, issuance of which was admitted in the Written Statement where there was no specific denial of the 'Inspection Report' alleged in the plaint. Under such circumstances, the provisions of Order VIII Rule 5 of CPC would be attracted and such allegations in the plaint shall be taken as admitted. Regarding this aspect of the case, the learned Single Judge has relied upon several case laws, which are more than enough to fortify such view. It is also crystal clear that in Written Statement, the issuance of Work Order was admitted with a denial that the work was not initiated but the appellant could not bring forth anything in the Written Statement or even during recording of evidence that the said Work Order was ever withdrawn. Hence, this point is decided in affirmative and it is held that

there is not a specific denial regarding alleged facts in Written Statement, as such on certain points like Assignment of Contract, issuance of Work Order and Inspection Report remained unrebutted.

Point No. 2

10. The learned counsel for the appellant has contended that the respondent being plaintiff has not annexed the contract/agreement with his plaint and he has also relied upon the photocopy of the inspection report and other documents. By preferring such submission, he contends that the respondent ought to be non-suited on account of relying upon secondary evidence, which according to him is inadmissible under the law. So far as nonproduction of the agreement is concerned, we are of the view that it is not the case as described by the learned counsel for the appellant. The work assigned to the respondent on the basis of 'Spot Quotations' for each job, which also contains terms and conditions and having signatures of the contract and executive engineer of the appellant. The format of these 'Spot Quotations' was annexed with the plaint and it reflected that the same were exhibited at the time of recording evidence. These 'Spot Quotations' were also the tender documents as the original of the same must have been available with the department. It is also a fact that nearly all the documents were produced by the respondent in the shape of photocopies and the reason was obvious that the original documents were in the possession of the appellant. Now the learned counsel for the appellant has objected to the production of photocopies of the documentary evidence. It is worth noting that at the time of recording of evidence, photocopies were produced by the appellant (plaintiff) and marked as exhibit by the learned Commissioner for recording evidence, without any objection from the appellant (defendant). If at the time of production of those documents, the objection was raised as to the admissibility of the documents, then the mere marking of the document as

an exhibit, does not preclude any objection being raised at a later stage even in appeal as to its admissibility. So far mode of proof is concerned, it is well settled that if an objection as to the admissibility at the stage when the document is marked as exhibit, then as per the provisions under Order XIII Rule 4 of CPC, such an objection cannot be raised at any subsequent stage. The endorsement or marking at the document with exhibit number and the initial of the Commissioner for recording evidence is generally in the form employed in Order XIII Rule 4 for the documents viz. Spot Quotations, Work Order and Inspection Report, which were produced by the respondent against the appellant. In the instant matter, the learned counsel for the appellant has put a question regarding the production of photocopies at the end of the cross-examination of the respondent (plaintiff) which he reasoned out by stating that he was given only photocopies by the department i.e. appellant (defendant). We are of the considered view that where the objection has not been raised regarding the inadmissibility of the document, it will not fulfil the purpose if only a question for the reasoning of the production of the documents was asked cursorily at the closure of cross-examination. We consider that it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie until the case comes before a Court of Appeal and then complain for the first time of the inadmissibility and mode of proof.

11. It is worth noting that at the time of recording of evidence, the appellant has not objected to the inadmissibility of photocopies of those documents. It is settled principle of the jurisprudence of evidence that the secondary evidence i.e. photocopy of a document, if not objected at the time of production and the same is produced and marked as an exhibit without any objection from the party against whom the same is produced then the secondary evidence becomes admissible. In this respect, reliance may be taken from the judgments reported as **Rehmat Wali vs Wahid**

Bakhsh (NLR 1979 Civil SC 809), Kabool Khan vs Shamoon through legal heirs and another (2001 YLR 51) and Sardar Muhammad Ramzan vs Muhammad Yahya Khan (2000 CLC 296). It is also a settled legal proposition that the photocopy of a document without producing original is inherently an inadmissible piece of evidence, and the same must require corroboration. In this respect, reliance is placed on a case reported as **Amirzada Khan and others vs Ahmed Noor and others (PLD 2003 Supreme Court 410).** While pronouncing the impugned judgment, the learned Single Judge has considered this aspect and he was well aware that even no objection was raised at the time of production of the document he was not absolved from considering the material fact that the secondary evidence required corroboration. Hence, the learned Single Judge has thoroughly discussed this aspect of the case in the impugned judgment. Nevertheless, the learned Single Judge has admitted the 'Work Order' and the 'Inquiry Report' not on the ground that there was no objection during recording of evidence but on the ground that the existence of these documents are not specifically denied rather Work Order was admitted in the Written Statement and the existence of Work Order and Inspection Report was also admitted by the official witnesses, who have been called from the department on the request of the respondent. The executive engineer also admitted the History Sheet of Work (P/29) as true while confronted during the examination. It cannot be presumed that Mr. Ghulam Mustafa, Executive Engineer (Exhibit P/32) and Mr. Masroor Ali, Staff Engineer (Exhibit P/33) have given an obliging statement as the record is silent regarding any action by the department for giving obliging statements. These witnesses have admitted the execution of work assigned to them by the department. Hence, we reply this point in affirmative i.e. against the appellant.

12. The ultimate outcome of the entire discussion is that we do not find any flaw and fault in the impugned judgment, consequently the instant High Court Appeal is dismissed alongwith the listed applications with no order as to cost.

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