

**IN THE HIGH COURT OF SINDH AT KARACHI
(ORIGINAL SIDE)**

Suit No. 2442 of 2015

(ICI Pakistan Limited v. Al Abid Silk Mills Limited)

Plaintiff:	ICI Pakistan Ltd Through Mr. Faiz Durrani, Advocate
Defendant:	Al Abid Silk Mills Ltd Through Mr. Abdallah Azzaam Naqvi Advocate
Date(s) of Hearing:	11-12-2023, 22-12-2023, 18-3-2024 & 10-2-2025
Date of Short Order:	10-2-2025
Date of Reasons:	17-2-2025

ORDER

1. **Sana Akram Minhas, J:** The present Suit No.2442/2015 ("**Suit 2442**") has been instituted on 10.12.2015 by the Plaintiff Company against the Defendant Company, for recovery of a sum of Rs.26,565,924/- along with future mark-up.
2. This order addresses CMA No.17637/2018 ("**CMA 17637**"), an application filed by the Plaintiff under Sections 74 and 76 of the *Qanun-e-Shahadat Order, 1984 ("QSO")*, read with Order 13 Rule 2 and Section 151 of the *Code of Civil Procedure, 1908 ("CPC")*. The CMA 17637 seeks permission to produce secondary evidence in the form of photocopies of documents attached as Annex P-5 and P-13 to the Affidavit-in-Evidence.

Description Of Documents For Submission As Secondary Evidence

3. Since the Affidavit-in-Evidence of the Plaintiff's witness (along with its annex) was not available on record, both learned Counsel for the respective parties on the Court's specific query confirmed twice that the documents referred to as Annex P-5 and P-13 in the Plaintiff's Affidavit-in-Evidence were identical to the Annex P-5 and P-13 of the Plaint. Hence, references to Annex P-5 and P-13 in the present CMA 17637 shall be construed as references to the

corresponding Annex P-5 and P-13 of the Plaint for the purpose of adjudication.

4. The Annex P-5 of the Plaint (**Court File Pg. 93 to 137**) consists of "*Purchase Orders*" allegedly issued by the Defendant to the Plaintiff. Notably, all these documents are unsigned and do not bear any official stamp of the Defendant.
5. The Annex P-13 of the Plaint (**Court File Pg. 743 to 1159**) comprises computer printouts (**Court File Pg. 743 to 753**) summarizing the "*Dispatch Advice*" along with photocopies of the "*Dispatch Advice*" (**Court File Pg. 755 to 1159**) allegedly issued by the Plaintiff.

Facts

6. According to the Plaintiff's CMA 17637, the Plaintiff and the Defendant entered into a business relationship in December 2011, with the Plaintiff initially supplying "*printing binder products*" to the Defendant. This was later followed by the supply of "*coating binder products*" in March 2012.
7. The CMA 17637 further asserts that Annex P-5 and P-13 of the Plaint were photocopied from the originals, when the Plaintiff was in possession of the original documents. However, during 2012–2013, when the Plaintiff Company was acquired by Lucky Cement Limited, the original documents comprising Annex P-5 and P-13 were allegedly "*lost/misplaced*" while stored in the godown. The Plaintiff claims that due to the change in the "*premises of record*" following the acquisition, the transfer of all documents resulted in the originals being "*misplaced/lost*".

Respective Submissions

8. The Plaintiff's Counsel argued that the takeover of the Plaintiff Company by Lucky Cement Limited, which occurred in 2012–2013, was a large-scale, trans-provincial operation, during which the originals of Annex P-5 and P-13 of the Plaint were lost or misplaced. Counsel contended that this situation fell squarely within the scope of Article 76(c) QSO. He emphasized that since the said annex were lost while in the custody of the Plaintiff, no notice, as contemplated under section 77 QSO, was required to be issued to the Defendant. He added that vide SECP's certificate dated 23.12.2022, the name of the Plaintiff (M/s ICI Pakistan Ltd) has been subsequently changed to M/s Lucky Core Industries Ltd.

9. Conversely, the Defendant's Counsel opposed CMA 17637, contending that firstly, the alleged Purchase Orders (Annex P-5 of Plaintiff) were never issued by the Defendant and secondly, the claim of the documents being lost or misplaced was never mentioned in the Plaintiff, nor in the initial Affidavit-in-Evidence of the witness (Azfar Ahmed Siddiqui son of Mazhar Ahmed Siddiqui). This witness was later substituted with the Court's permission by an order dated 15.8.2018. Furthermore, the plea was also absent from the Affidavit-in-Evidence of the subsequent witness (Muhammad Raheel son of Sharfuddin). Counsel averred that it was only after the Evidence Commissioner, in November-December 2018, refused to exhibit photocopies of Annex P-5 and P-13 that this claim of loss/misplacement was raised by the Plaintiff for the first time in CMA 17637, making it a mere afterthought.

Opinion Of Court

Destruction Or Loss Of Document To Be Proved First And Should Not Be Attributable To The Party's Own Default Or Neglect

10. The foundational principle governing proof of contents of documents is that they are to be proved by producing "primary evidence" or "secondary evidence"¹. Article 75 QSO lays down the general rule that documents must be proved through primary evidence. Article 73 QSO defines primary evidence to mean the document itself produced for the inspection of the Court. However, Article 76² QSO lays down certain exceptions to the general

¹ *Akhtar Sultana v. Muzaffar Khan Malik* (PLD 2021 SC 715 [paragraph 11])

² Article 76 of Qanun-e-Shahadat Order, 1984: 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) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative-in-interest;
- (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
- (d) when, due to the volume or bulk of the original, copies thereof have been made by means of microfilming or other modern devices;
- (e) when the original is of such a nature as not to be easily movable;
- (f) when the original is a public document within the meaning of Article 85;
- (g) when the original is a document of which a certified copy is permitted by this Order, or by any other law in force in Pakistan, to be given in evidence;
- (h) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection;

rule and permits a party to submit secondary evidence of a document in certain situations. One of the situations is covered by Article 76(c) QSO, relied upon by the Plaintiff's Counsel, which stipulates that secondary evidence may be given of the existence, condition or contents of a document **when the original has been destroyed or lost**, or when the party offering evidence of its contents cannot, for any other reason **not arising from his own default or neglect**, produce it in reasonable time. In other words, secondary evidence may only be introduced if the original documents have been lost or destroyed due to circumstances beyond the party's control, provided that the loss did not arise from the party's own default or neglect.

11. The Plaintiff itself has admitted that the original documents were lost or misplaced during the large-scale, trans-provincial acquisition of the Plaintiff Company by Lucky Cement Limited. This admission clearly indicates that the loss resulted from the Plaintiff's own internal processes, including the transfer and relocation of records during the acquisition process. Such an event suggests a lack of due diligence in safeguarding critical documents during the transition. While a large-scale corporate transition inherently involves significant logistical challenges, including the handling, storage, and transfer of crucial documents, it remains the Plaintiff's responsibility, as a corporate entity, to ensure that its records are properly preserved and safeguarded, particularly those that may later be relied upon in legal proceedings.
12. Article 76(c) QSO, permits the introduction of secondary evidence when the original document has been lost or destroyed, but only under the condition that the loss is not attributable to the party's own default or neglect. The provision is intended to protect parties who, despite exercising reasonable care, are unable to produce the original documents due to unforeseen or uncontrollable circumstances. However, in this case, the Plaintiff has not demonstrated that the loss occurred due to any external or unavoidable factors beyond its control. Instead, the misplacement of the documents appears to be the direct result of its own failure to maintain adequate record-keeping practices during the acquisition process.
13. The Plaintiff's casual and indifferent manner in pleading the loss of its original documents reflects not only a lack of seriousness in maintaining

(i) when an original document forming part of a judicial record is not available and only a certified copy thereof is available, certified copy of that certified copy shall also be admissible as a secondary evidence.

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

In case (b), the written admission is admissible.

In case (f) or (g) certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (h), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such document.

crucial records but also a similarly nonchalant approach in invoking the protection of Article 76(c) QSO. The Plaintiff has failed to provide any detailed or substantive explanation regarding the circumstances under which the documents were misplaced, nor has it demonstrated any concrete efforts to locate or retrieve them. Not a single internal memo or piece of correspondence exchanged within the Plaintiff's department has been attached to CMA 17637. So also, the Plaintiff claims a change in the "premises of record" post-acquisition, yet has not explained what the address of the earlier premises was or to what new address it was shifted. Instead, it has merely stated, in a vague and generalized manner, that the loss occurred during the cross-provincial acquisition of its company by Lucky Cement Limited. The Plaintiff was obligated to at least bring enough or sufficient evidence of the documents' loss alongside its CMA 17637. The Plaintiff cannot anticipate being granted time after filing the CMA (and, in this case, even its rejoinder) to assemble evidence pertaining to the loss. The court must first decide whether the loss of the original document has been established, and if proven, then proceed to evaluate the inherent value of the secondary evidence presented³. The Plaintiff has not been able to establish the loss of documents (Annex P-5 and P-13 of Plaintiff).

14. This lack of specificity and accountability raises serious doubts about whether the Plaintiff exercised the necessary diligence in safeguarding its records. Given the significant financial implications of the present Suit 2442, one would reasonably expect the Plaintiff to have maintained a robust system of record-keeping, particularly for documents that form the basis of its claim. However, the Plaintiff's failure to do so, suggests that it is attempting to use this legal provision as a mere convenience rather than as a justified legal remedy.
15. In legal proceedings, parties seeking the benefit of an exception to evidentiary rules bear the burden of proving their entitlement to such relief. Here, the Plaintiff's own actions – or lack thereof – demonstrate an absence of genuine effort to preserve the original documents, thereby weakening its claim for protection under Article 76(c) QSO. The overall casualness with which this issue has been raised reflects an equally casual and opportunistic attempt to rely on secondary evidence, which should not be permitted in the absence of a compelling justification to meet the genuine hardship of a litigant.

³ *Khurshid Begum v. Chiragh Muhammad* (1995 SCMR 1237 [A]); *Gujranwala Development Authority v. Muhammad Hussain* (2001 YLR 1884 [A]); *Amirzada Khan v. Ahmad Noor* (PLD 2003 SC 410 [C]); *Akhtar Sultana v. Muzaffar Khan Malik* (PLD 2021 SC 715 [paragraphs 16 & 18]); *Noor Jehan v. Saleem Shahadat* (2022 SCMR 918 [paragraph 13])

Non-Disclosure of Material Fact Allegedly Occurring Prior To Institution Of Suit

16. Additionally, what is particularly surprising is that the alleged acquisition took place in 2012–2013 i.e. at least two years before the institution of Suit 2442 on 10.12.2015, yet there is no mention of the loss or misplacement of the original documents anywhere in the Plaint. If the Plaintiff had indeed lost the documents during the acquisition process, it would have been a material fact that should have been disclosed at the very outset of the proceedings.
17. Similarly, no mention is again made of the loss of documents either in the Affidavit-in-Evidence of the first witness (viz. Azfar Ahmed Siddiqui, filed in December 2017) nor in the Affidavit-in-Evidence of the subsequent witness (viz. Muhammad Raheel, filed in April 2018) who substituted the first witness with the Court's permission which was granted by order dated 15.8.2018.
18. The complete absence of any reference to this alleged loss in the Plaint or in any of the two Affidavit(s)-in-Evidence raises serious doubts about the credibility and consistency of the Plaintiff's claim.
19. The fact that the Plaintiff only raised this issue after the Evidence Commissioner (appointed vide order dated 28.8.2017) sometime in November-December 2018 refused to exhibit the photocopies of Annex P-5 and P-13 further weakens its position. If the Plaintiff had been aware of the loss earlier, it should have disclosed this fact at the outset of the proceedings and taken appropriate steps to establish the unavailability of the originals. The failure to do so suggests a lack of due diligence in preserving essential documents and raises concerns about whether the loss is being invoked as a belated justification for introducing secondary evidence.

Material Contradictions

20. Moreover, the contents of CMA 17637 further expose contradictions in the Plaintiff's position. On one hand, the CMA 17637 asserts that the original documents were lost during the acquisition in 2012–2013. However, on the other hand, the same CMA states that the photocopies of the documents were made from the originals at a time when the originals were in the Plaintiff's possession, which can only mean that when the Plaint was filed on 10.12.2015, the Plaintiff was in possession of the originals of Annex P-5 and P-13. This statement implies that the Plaintiff was still in possession of the original documents at least until the date of filing the Suit 2442, thereby

contradicting its earlier claim that the documents had been lost years prior (allegedly in 2012–2013) during the acquisition process.

21. Likewise, Order 7 Rule 14 CPC⁴ mandates that when a plaintiff bases its suit on a document in its possession, it must produce the original document in court at the time of filing the plaint. Simultaneously, a copy of the document must be submitted to be filed with the plaint. In the present case, the Plaintiff Company's attachment of Annex P-5 and P-13 with the Plaint is yet again a testament that the originals of these documents were in the Plaintiff's possession at the time the Suit 2442 was filed – an occasion that occurred post-acquisition.
22. This inconsistency is not a minor oversight; rather, it significantly undermines the credibility of the Plaintiff's argument. If the originals were available in 2015 for making photocopies, as the Plaintiff now claims, then the assertion that they were lost in 2012–2013 cannot be true. Conversely, if the documents were indeed lost during the acquisition, then the Plaintiff's claim of having made photocopies from the originals at the time of filing the Suit is demonstrably false. The Plaintiff cannot have it both ways.
23. Such contradictions not only cast serious doubt on the veracity of the Plaintiff's claim regarding the loss of documents but also suggest that the plea to introduce secondary evidence is a belated and opportunistic attempt to circumvent evidentiary rules. The lack of any reference to this issue in the Plaint, coupled with the conflicting statements in CMA 17637, indicates that the Plaintiff's narrative regarding the alleged loss of documents has been constructed as an afterthought, rather than being a genuine and contemporaneous assertion of fact.

Conclusion

24. Given these circumstances, the Plaintiff cannot claim the benefit of Article 76(c). The loss of the original documents was not due to an uncontrollable or unforeseeable event but rather resulted from the Plaintiff's own internal mismanagement. Allowing secondary evidence under these conditions would undermine the principle that parties must exercise proper care in preserving documentary evidence, particularly when such documents form the basis of a legal claim. Therefore, the Plaintiff's request to rely on

⁴ *Iftikhar Ahmad v. Muhammad Younus Khan* (1982 CLC 2114); *Ghulam Ali v. Muhammad Hussain Kathawala* (PLD 1985 Kar 152); *Javed Rafat Khan v. Shabbir Tiles* (PLD 2005 Kar 1); *Uzma Aziz v. Maryam* (PLD 2006 Kar 58)

secondary evidence under Article 76(c) is legally unsustainable and, thus, cannot be entertained.

25. The protection of Article 76(c) is not granted mechanically or routinely; it is contingent upon the party demonstrating that the loss of documents occurred despite exercising reasonable care and was not due to its own negligence. The Plaintiff's casual assertion of loss, without any accompanying evidence of efforts to prevent or mitigate such loss, indicates a lack of due diligence. Moreover, the fact that this plea has only been raised after the Evidence Commissioner refused to exhibit photocopies of Annex P-5 and P-13 further underscores the impression that the Plaintiff is treating the invocation of Article 76(c) as an afterthought rather than a legitimate legal entitlement.
26. By short order on 10.2.2025, the Plaintiff's application (CMA No.17637/2018) to submit secondary evidence of documents (attached as Annex P-5 and P-13 to the Plaint) was **dismissed**. Here is why. No costs are imposed.

JUDGE

Karachi
Dated: 17th February, 2025