IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

1st Civil Appeal No.S-61 of 2023

Appellant:	Khurram Rawal son of Haji Rawal, Through Mr. Zulqarnain Talpur, Advocate.
Respondent:	Muhammad Sohail son of Muhammad Yousaf, Through Mr. Muhammad Hussain Khan, Advocate,
Date of hearing:	28.02.2025
Date of Judgment:	28.02.2025

J U D G M E N T

Abdul Hamid Bhurgri, J,- The appellant/defendant has called into question the impugned Judgment dated 30.10.2023 and Decree dated 31.10.2023, passed by learned II-Additional District Judge, Hyderabad in Summary Suit No.149 of 2022 re-Muhammad Sohail versus Khurram Rawal, whereby suit against him was decreed.

2. The respondent/plaintiff had filed Summary suit claiming that he being an owner of S.S and sons Construction Company entered into a contract with the appellant/defendant for development work i.e. earth work, sewerage system, boundary wall and construction of main gate for his scheme Fatima Green Valley Tando Hyder worth Rs.2,21,99,000/- (Rupees Two Crore Twenty One Lac Ninety Nine Thousands only). He stated in his memo of plaint that the work was done to the appellant/ defendant within period of a year and after completion of the contract, an amount of Rs.51,00,000/- (Rupees Fifty One Lac only) were outstanding against the defendant/appellant, which are liable to be paid to plaintiff/ respondent and in this respect, the defendant handed over a Civil Car bearing registration No.BKG-939 Honda Civic Saloon Model 2017 colour Lunar silver, chassis No.NFBFC666HR023198 and Engine No.R18Z12919810 along with running papers and one cheque bearing No.51206730 of Rs.15,00,000/- (Rupees Fifteen Lac only) dated

15.07.2022 of his account of JS Bank DHA branch Hyderabad to the plaintiff/respondent. The aforesaid cheque was deposited by the plaintiff/ respondent in his bank account of Meezan Bank Auto Bhan road branch on 30.08.2022, which was returned along with memo due to insufficient funds. It is submitted that the appellant/defendant had been keeping the plaintiff/respondent on false hopes, ultimately, the respondent/plaintiff sent legal notices dated 01.09.2022 and 14.09.2022 to the appellant/defendant, who did not bother to reply the same thus cause of action arose and the suit was filed and following prayers were made:-

> (a) That this Honourable Court may be pleased to pass Judgment and Decree in favour of plaintiff against the defendant to direct the defendant to pay the total principal amount of Rs.15,00,000/- (Fifteen Lac only) along with equivalent to Bank interest at the rate of 20% from the date of filing this suit, till the realization of decreetal amount.
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> (b) In case of failure this Honourable Court may be pleased to attach/sale movable and immovable properties of defendant and if any found for the satisfaction of the Decree.
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> (c) Costs of the suit may be borne by the defendant.
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> (d) Any other relief which this Honourable Court be deemed fit and proper be granted in favour of plaintiff.

3. The defendant/appellant was served and consequent to grant of leave to defend, he filed written statement admitting the contract between parties; denied outstanding amount of Rs.51,00,000/- and handing over a Civic car to the plaintiff/respondent or issuance of disputed cheque. The defendant/appellant submitted his defence that contract was in respect of construction of boundary wall for housing scheme under the name and style of “Fatima Green Valley Tando Hyderabad”; due to substandard material used by the plaintiff/respondent, the boundary wall

sustained damage, the defendant/appellant paid about Rs.2,19,00,000/- through vouchers. It was further defence that the plaintiff/respondent received the amount of disputed cheque through voucher No.33 dated 18.07.2022 in which the disputed cheque is also mentioned. It is also stated appellant's car was required to the plaintiff/respondent in a marriage in his family, therefore the appellant/defendant gave him car and according to the defendant/appellant; he never sold out his car nor did he give towards any liability. It is further stated that the plaintiff/respondent after receipt of the amount did not return the cheque. Further, the appellant /defendant denied service of legal notices and prayed for dismissal of the suit being not maintainable and barred by law having no cause of action.

4. The trial court framed following issue:-

1. Whether, the plaintiff is entitled to decree of Rs.15,00,000/- on the basis of dishonoured cheque bearing No.51206730 dated 15.07.2022 of JS Bank Limited DHA Branch Hyderabad?

2. Whether, the suit of the plaintiff is not maintainable under the law, in its present form?

3. Whether, suit of the plaintiff is causeless?

4. Relief?

5. The plaintiff/respondent Muhammad Sohail in order to prove his case, examined himself as PW-1 at Ex.14, who produce cheque No.51206730 dated 15.07.2022 for Rs.15,00,000/- issued by defendant along with cheque return memo at Ex.14/A and 14/B respectively, paper of Honda Civic car, excise letter, certificate of insurance, paper of original registration book of the car at Ex.14/C to 14/F respectively and legal notice dated 01.02.2022 along with its envelop at Ex.14/G and 14/H respectively, In support of his claim, plaintiff examined his witness PW-2 Aalam Khan at Ex.15. Thereafter side of his case was closed vide statement at ex.16.

6. The defendant/appellant examined himself as DW-1 at Ex.17, who produced original voucher dated 18.07.2022 at Ex.17/A. in support of

his claim, the defendant examined his witness Danish Khan as EW-2 at Ex.18, who produced his affidavit in evidence at Ex.18/A and then side of his case was closed vide statement at Ex.19.

7. Learned trial court after recording evidence and hearing counsel for parties, decreed the suit vide impugned Judgment dated 30.10.2023 and Decree dated 31.10.2023. Hence this appeal has been preferred by the appellant/defendant.

8. Learned counsel for the appellant argued that the judgment passed by the trial court is against the law and the evidence on record. He contended that the appellant had returned the disputed amount of Rs.15,00,000/- to the respondent through voucher dated 18.07.2022 Ex.17/A and in order to substantiate he stated that witness of the voucher Danish Khan has also been examined as Ex.4. The learned counsel contended that non reading of such evidence on the part of trial court requires to be set at naught by this Honourable Court. He has relied upon Messers Noman Abid Co.Limited v. Naveed Haider, 2019 CLC 2052.

9. Conversely, learned counsel for the respondent stated that judgment passed by the Honourable Court is well reasoned, in accordance with law. He further states that the appellant has failed to discharge onus of paying the amount to respondent. He further argued that plaintiff/ respondent has successfully proved his case in the trial court thus the judgment and decree passed by learned trial court does not require interference thus appeal is liable to be dismissed.

10. The learned counsel for the appellant and the respondent were heard at length.

11. In order to determine the appeal, the following points have been framed:

i. Whether the appellant/defendant discharged the disputed liability of Rs. 15,00,000 (fifteen lakh rupees) via voucher No. 33, dated 18.07.2022, in favour of the respondent/plaintiff?

ii. What should be the appropriate judgment in light of the findings on the above issue?

POINT NO.1.

12. According to the respondent/plaintiff an amount of Rs.51,00,000/- was outstanding against defendant/appellant in lieu of the contract between them. The appellant/defendant had handed over Honda Civic car to the respondent/plaintiff bearing registration No.BKG-939 model 2017 along with running papers and one cheque bearing No.51206730 of Rs.15,00,000/- dated 15.07.2022 of his account JS bank DHA Hyderabad. The same was deposited by the plaintiff/respondent in his bank account Meezan bank Auto Bhan road branch on 30.08.2022 and same was returned along with memo due to insufficient funds. He produced the cheque along with the memo before the trial court. The trial court had granted leave to defend application vide order dated 22.12.2022 consequently the written statement was filed by the defendant/appellant. His defence in the written statement was that amount of Rs.15,00,000/- has been paid by the appellant/defendant vide voucher No.33 dated 18.07.2022. The perusal of written statement transpires that nothing is mentioned regarding names of witnesses of the voucher, however, the appellant's counsel argued that one Danish Khan who filed affidavit in evidence was witness of the voucher. In written statement he had not denied that he had not issued cheque.

13. There is no denial regarding issuance of cheque and amount outstanding, the only point in this case is whether the defendant/appellant has discharged onus regarding payment of disputed amount to the plaintiff/ respondent. This court has thoroughly gone through the record of the case. Perusal of the written statement shows that the names of the witnesses

have not mentioned in the written statement. The alleged witness of voucher Danish Khan had filed his affidavit in evidence. The cross examination of witness Danish Khan is as under:-

> *"Initially the agreement in respect of development of Housing Scheme "Fatima Green Valley Tando Haider" was reduced in writing in between plaintiff and defendant but subsequently they acted on oral agreements. I do not remember the exact date on which such agreement was executed, but it pertains to year 2021. The contract of more than two Crore was made in between plaintiff and defendant in respect of the development of the scheme. The boundary wall of the scheme was constructed by the plaintiff with guarantee of 20 years but unfortunately such wall fallen down within six months of its construction. I don't remember the exact date when defendant gave Honda Civic Car to plaintiff for use in marriage ceremony, but the same was given to him in the year 2021-22.* ***It is correct to suggest that I have not signed any voucher of the payment.*** *It is correct that I am employee of the defendant. It is incorrect to suggest that I am deposing falsely at the instance off defendant being his employee. It is incorrect to suggest that plaintiff is not known to me.*

14. From the perusal of the above cross examination of the witness Danish Khan, it is clear that he is not the witness of the voucher neither he had signed the same as alleged by the appellant/defendant. The appellant failed to disclose the name of any witness in the written statement. The alleged witness Danish Khan, who purportedly signed the voucher did not corroborate the appellant's version.

15. Furthermore, the appellant had not mentioned the name of other signatory on the voucher as there are two signatories shown to have signed the voucher. This Court has specifically asked the counsel for appellant regarding name of the other signatory but he failed to disclose the same. Thus, the appellant withheld the evidence which could have favoured him. Pursuant to Article 129(g) of the Qanun-e-Shahadat Order, 1984, an adverse presumption is drawn when a party withholds evidence which reads as under:-

> *“129(g). that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it”*

This principle dictates that if the appellant had indeed produced the witnesses, their testimony would not have supported his claim. Alternatively, their absence suggests the evidence does not exist. The Hon’ble Supreme Court of Pakistan in “Jehangir v. Mst. Shams Sultana and others” (2022 SCMR 309) has held as follows at paragraph No.4:-

> *“We are surprised that the plaintiff/respondent No.1 did not come forward to testify that she had not sold the property as reflected in the said sale mutation, particularly when her sister and mother had testified in support of the said sale. A direct challenge had also been thrown to her husband/ attorney that if the plaintiff came to testify she would acknowledge the sale. When the best evidence is intentionally withheld an adverse presumption ensues that if it was produced it would be against the person withholding it as per Article 129(g) of the Qanun-e-Shahadat, 1984.”*

Likewise, Hon’ble Supreme Court of Pakistan in “Mst. Zarsheda v. Nobat Khan” (PLD 2022 SC 21) has ruled as follows at paragraph No.9:-

> *“9. At this juncture Article 129 of the Qanun-e Shahadat Order 1984 is quite relevant under which court may presume the 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. According to the illustrations highlighted for resonating the presumption, Illustration (g) is quite relevant which illuminates "that evidence which could be and is not produced would, if produced, be un-favourable to the person who withholds it". Adverse inference for non production of evidence is one of the strongest presumptions known to law and the law allows it against the party who withholds the evidence. Regardless of the presence of important witnesses (the alleged donor) and the alleged witness of the mutation, the defendant failed to produce them despite framing of specific issue whether there was no transaction of sale but a gift.”*

In the same vein in “Muhammad Naeem Khan and another v. Muqadas Khan (decd) through L.Rs. and another” (PLD 2022 SC 99) the Hon’ble Supreme Court of Pakistan has held as follows:-

> *“Where a party keeps hold of the witnesses, the presumption would be that if such witnesses were produced, their testimony must have against him, therefore adverse inference of withholding evidence goes against the party who failed to call the concerned person engaged in the transaction who was in a better position to give firsthand and straight narrative of the matter in controversy. According to Article 129 of the Qanun-e-Shahadat Order 1984, the court may presume the 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. Illustration (g) attached to this Article is quite relevant to the facts and circumstances of the case in hand in which the court may draw adverse inference or presumption that evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it. No misreading or non-reading of evidence or any other defect or error was pointed out in the impugned judgments which may warrant interference by this court.”*

16. From the above dictum laid down by the Honourable Supreme Court, it is clear that the appellant/defendant miserably failed to prove his version regarding payment of Rs.15,00,000/- (Rupees Fifteen Lac) to the respondent/plaintiff.

17. The respondent/plaintiff has furnished documentary evidence establishing that the cheque in question was dishonoured and no valid payment was made. Had payment been effected, the appellant would not have acknowledged the liability in the first place. Given that the appellant has already acknowledged the claim, the burden of proof does not shift to the respondent. Despite this, the respondent has provided substantial documentary evidence to prove his claim. Even otherwise according to Article 113 of Qanoon-e-Shahadat Order, 1984, the facts admitted need not to be proved. Article 113 of Qanoon-e-Shahadat Order, 1984 is reproduced hereinunder:-

> *“113. Facts admitted need not be proved. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions”.*

In the case of Muhammad Rafiq and others vs Muhammad Ali and others (2004 SCMR 704), the Apex Court has held as under:

> *"It had been claimed through para. 3 of the plaint that Siraj Din son of Nabi Bukhsh had died in the year 1966 and that he had left behind his widow, namely, Mst. Barkat Bibi, two sons, namely, Muhammad Din and Muhammad Rafiq and a daughter, namely Mst. Zainab Bibi. The pedigree-table of said Siraj Din was also drawn in the said paragraph. The petitioners-defendants replied the said averments through their written statement in the following terms:--*
>
> *"3. Admitted. Correct."*
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> *The concurrent finding of the learned Appellate and the Honourable revisional Court that in view of this judicial admission through the written statement no issue was required to be struck and no further proof of this question was warranted from the plaintiff was a perfectly valid finding."*

18. Though the appellant has claimed that the Honda Civic car was required by the respondent/plaintiff in a marriage in his family therefore, he gave him the car, he claimed that he never sold the car nor did he give towards any liability when the court has put question to the counsel that whether you have filed any legal proceedings against respondent/plaintiff for return of your vehicle the answer was in the negative. This reply reflects that the claim of respondent/plaintiff that the car was given for the adjustment of the amount appears to be correct.

19. In the precedent relied upon by the appellant’s counsel supra, the disputed/subject cheque was stated to be dishonoured due to internal error of the Bank and it could not be cleared, it was replaced by the pay

order hence, case law relied upon by the appellant's counsel is distinguishable with the facts and circumstances of present appeal.

20. The trial court rightly has held that the appellant has failed to discharge his burden regarding return of amount of Rs.15,00,000/- even his witness has not supported his case. Hence this point is decided in negative by holding that the appellant has miserably failed to prove the payment of disputed amount to the respondent.

POINT NO.2.

21. After considering all the material and evidence there is no reason to interfere with the judgment dated 30.10.2023 and decree dated 31.10.2023 passed by the trial Court which is well reasoned, sound and based on correct assumptions of facts and law, consequently this **Appeal is dismissed** with no order as to costs.

The above are the reasons for short order dated 28.02.2025 whereby the Appeal was dismissed.

JUDGE