**Order Sheet**

**IN THE HIGH COURT OF SINDH, KARACHI.**

**Present**:-
**Mr. Justice Muhammad Iqbal Kalhoro.**
**Mr. Justice Shamsuddin Abbasi.**

**C.P.No.D-3807 of 2021**
Muhammad Imran

**Versus**

Chairman, NAB & others

**C.P.No.D-3976 of 2021**
Faisal Masroor Siddiqui

**Versus**

Chairman, NAB & others

**Date of hearing** : **13.10.2021**

**Date of order** : _____

Mr. Shoukat Hayat, advocate for petitioner in CP No.D-3976/2021.
Mr. Humayun Hanif, advocate for petitioner in CP No.D-3807/2021.
Mr. Jamil Ahmed, AAG.

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**O R D E R**

**Muhammad Iqbal Kalhoro, J**:- Petitioners, standing a trial in Reference No.13/2020 charging them and other accused for carving out, and leasing plots worth of Rs.300 million in Bath Island Karachi in their favour by committing forgery in the record of Karachi Municipal Corporation ("**KMC**"), opposed applications filed by prosecution under **Article 76 Qaunan-e-Shahadat Order, 1984** (**Qaunan-e-Shahadat Order),** seeking permission to produce Photostat documents seized during investigation in evidence. Their objections were turned down and applications were allowed vide order dated 28.05.2021, which they have impugned in the petitions in hand.

2. Learned defense counsel have reiterated grounds set out in the petitions that prosecution is required to fulfill directives outlined under Articles 76 and 77 of Qaunan-e-Shahadat Order, and unless the loss of original documents is not established, they cannot produce Photostat copies in the evidence. No ground has been taken in the applications as to

why Photostat copies of documents are sought to be produced. The trial court was under obligation to undertake an inquiry to ascertain loss of original documents before allowing the applications. They have relied upon case laws reported in **1995 SCMR 1237, AIR 2010 SC 1162, 2020 MLD 794, 2011 YLR 890, 2014 CLC 773 Lah, 2001 CLC 1796 Lah, 2020, 2020 CLC 1124, PLD & 2005 SC 418.**

3. On the other hand, learned Special Prosecutor, NAB submitted that these documents were seized during investigation, are part of the prosecution case and were supplied to the petitioners in compliance of 265-C CrPC before framing charge against them.

4. We have considered submissions of the parties and perused the material available on record including the case law cited at bar. In our view, for reasons recorded herein under, the objection of defense over production of Photostat copies is misconceived. Record reflects that recovery of these documents was effected in investigation under a seizure memo duly witnessed by the witnesses. They were handed over to the IO by a KMC official posted as Deputy Director, Land Lease KMC, Karachi, and are undisputedly part of the prosecution case. Prosecution does not wish to establish some civil right in its favour by producing these documents. But its object is to show to the court material collected during investigation to establish allegation of forgery in the record against the accused. This material and it being seized from KMC office as it is in view of prosecution is incriminatory itself, part of the charge and a proof in its own making of manipulation and maneuvering in the record.

5. More than that they being public documents, part of the record of KMC, are not required to be proved under the scheme provided under Article 76 to 79 of Qaunan-e-Shadadat Order which relates essentially to mode of proof of a private document. Mode of proof of a public document is set out under Article 88 and 89 of Qaunan-e-Shadadat Order, is completely distinct to the manner enforced for proving a private document. Furthermore, tendering or producing a document in evidence in a criminal case, collected/seized in the investigation under a seizure memo, is to be seen in the light of construction provided u/s 94 CrPC and Article 91 of Qaunan-e-Shadadat Order. Section 94 CrPC, among others, empowers the IO to collect/seize a document required for investigation purpose. While Article 91 attaches a presumption of genuineness to a document collected as such. Although that presumption is rebuttable but be that as it may the document would be admissible in evidence unless it is excluded by the law from being admitted. A reading of *ibid* provisions of law

together would make it abundantly clear that if a document purporting to be a record or memorandum of the evidence fulfills requirement as stipulated in the said provisions would be admissible in evidence.

6. While deciding some petitions **(C.P.No.D-1640/2012 & others)** brought up against the same controversy i.e. tendering of Photostat copies seized in investigation in evidence, we have held vide **order dated 15.10.2021** that mere tendering of a document in evidence is a different concept in law to accepting it as admissible evidence having probative value. A document being tendered in evidence would not imply that it has been accepted by the court as an admissible piece of evidence and its evidentiary or probative value has been looked into and determined. Producing original document (primary evidence) or its certified copy, etc. (secondary evidence) in evidence is basically the mode of proving the document itself, its existence, and not the contents it contains. Determination of evidentiary or probative value of the contents thereof is the next stage which is to be undertaken only after existence or execution of a document has been established either through primary or secondary evidence, as the case may be. First stage is to prove existence of a document itself, once it is done positively, second stage to prove the contents the document seeks to convey arrives. Tendering a document in evidence is regulated by wholly a distinct rule, it concerns with mode of proving the document itself, its existence, proving its probative value is a different matter, it involves assessment to be made by the trial court of a fact the document seeks to establish. In order to bring home such point, in our order , we have quoted two judgments of the Honorable Supreme Court **{Hyderabad Development Authority through MD Civic Center Hyderabad Vs Abdul Majeed and Others (PLD 2002 SC 84), and Dawa Khan through LRs and others Vs. Muhammad Tayyab (2013 SCMR 1113)}** holding, among others, that when a Photostat document is taken on record subject to its admissibility and later no steps are taken to prove the contents of the document by leading primary or secondary evidence in terms of Articles 75 and 76 of Qanun-e-Shahadat the document cannot be taken into consideration. And that merely by tendering a document in evidence, it gets no evidentiary value unless its contents are proved according to law, and that admissibility of a document in evidence by itself will not absolve the party from proving it contents in terms of Article 79 of Qanun-e-Shahadat.

7. However, it has been stressed in the said order, when a piece of evidence/document sought to be tendered is admittedly inadmissible, irrespective of mode of proof of such document; its production in evidence

will be denied. To this proposition, there could be no cavil. It is a judicially recognized fact and has been upheld in several pronouncements. But at the same time, it has been urged, that to hold or to view that a given piece of evidence is inadmissible (its contents cannot be accepted or admitted to have probative value as such) will involve presence of predetermination of such fact. If the evidence/document is undisputedly inadmissible, it will not be permitted to be brought on record by the court regardless whether or not any objection in this respect has been raised by the defense. But if the defense objects to its tendering i.e. mode of its proof, it will be the duty of the court to decide it immediately and not defer it. Because, even if these document were allowed to be brought on record, being inadmissible, would not be looked into by the court for determination of their probative value. However, when it is not the case, and the objection is not on existence or execution of the document itself but on its contents, its evidentiary value, the fact it seeks to convey, and when there is a chance that primary or secondary evidence may be led to prove its contents, it production in evidence will not be denied.

8. It is further stated in the said order that mode of proof of a public document seized in the investigation is rolled out under Articles 88 and 89 of Qanoon-e-Shahadat. A reading thereof would demonstrate that certified copies could be produced in evidence in proof of contents of a public document. And that fhe objection is not that these documents do not exist and have been forged and fabricated. But as the prosecution has not produced the original documents or offered any explanation for its loss or absence, and that the witness who has produced the document is neither author nor signatory or attesting witness thereof, they are inadmissible having no evidentiary value. Replying the same, we have observed that these objections are not on mode of proof of the document itself but what the document seeks to convey, the evidentiary value, and are relevant to a private document, where it is upon the party concerned to prove first existence or execution of the document it is relying upon for the court to look into it for determining its evidentiary value.

9. It is next held that the rule governing mode of proof of a public document is different to mode of proving a private document. No doubt, the primary evidence is the document itself and its certified copy, etc. is the secondary evidence. But to an official/public document presumption of genuineness is attached, therefore, attested or certified copy thereof is relevant and admissible in evidence, unless contrary is proved rebutting such presumption entirely. As such there is no requirement of law to

examine author or attesting witness to prove existence or execution of a public document. However, when the very existence of a document is disputed, then it would be incumbent upon the prosecution etc. to produce the original document.

10. Then, to further elaborate the point, we have quoted an earlier decision rendered on **26.07.2021 in C.P.No.D-3045/2021** dealing with an identical question. It is held in that decision that scheme of criminal law is altogether different to civil proceedings. The document in investigation is collected/obtained under a seizure memo. Section 94 CrPC is relevant in this respect and, among others, empowers the IO to seize or collect a document required for investigation purpose. Whereas, under Article 91 of of Qanoon-e-Shahadat, the document, purporting to be a record or memorandum of the evidence, can be produced in the court by a witness and it will have a presumption of genuineness attached to it. It however is a rebuttable presumption and its veracity is to be judged by weighing all the aspects including objection, relevancy and other factors. That decision was questioned before the Honorable Supreme Court in **a Civil Petition No.4878 of 2021** and decided vide **judgment dated on 06.09.2021**. The Honorable Apex Court has endorsed findings of this court on both the counts i.e. collection and production of a document in a criminal case is relevant as per scheme u/s 94 CrPC, and presumption of genuineness is attached to the document produced as such as record of evidence under Article 91 of Qanoon-e-Shahadat, so also the finding that dispensation under criminal case is entirely different to the one under the civil proceedings. Further it has also been highlighted by us in the said order that the rule to appreciate a document in a criminal case as an admissible piece of evidence cannot be identified with the regime applied to appreciate a document for the said purpose in a civil case. While the claim of a party in civil proceedings is decided on preponderance of probability, all which is necessary in a civil case is to show that proof adduced in support of a fact is such that it will make a prudent mind to act upon it. But in a criminal case, the prosecution has to prove guilt of an accused beyond a reasonable doubt. His conviction is recorded by the court only when it is satisfied that possibility of his innocence, on the basis of evidence adduced against him, is completely ruled out.

11. For foregoing discussion, and the inference already made by us in several orders passed on petitions (quoted above) having been brought

to decide identical question, we see no merits in the petitions in hand and dismiss them accordingly along with all the pending applications.

JUDGE

JUDGE

**Rafiq/P.A.**