

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 2121 of 2019

For orders on the Commissioner Report dated 20 May 2023.

Mst. Sanobar Rizwan, Plaintiff through	:	Mr. Muhammad Umer Lakhani Advocate and Mr. Ishfaq Ahmed Advocate
Mst. Naseera Begum, Defendant, through	:	Mr. Ahmer Jamil Khan, Advocate
Date of hearing	:	13 October 2023, 14 October 2023 and 24 February 2024
Date of Order	:	18 January 2025

ORDER

MOHAMMAD ABDUR RAHMAN J., This order will dispose of a Commissioners Report dated 20 May 2023 which has been referred to this Court in the following terms:

“ ... *The undersigned was appointed commissioner to record evidence of the parties on 27.09.2022 and the copy of the order was received on 04.10.2022. The notices to the respective parties were issued and the case was fixed for filing of list of documents, issues settled by court and A/E of the Plaintiff.*

The Counsel for the Plaintiff files affidavits in evidence on 12.01.2023, copies of the same supplied to the other side. The Examination in Chief of the plaintiffs' attorney namely Rehan Chottani was partly recorded on 09.02.2023 but thereafter, the matter was adjourned on the request of both parties. The Counsel for the plaintiff requested to mark photocopies of emails and certain documents to be exhibits but the counsel for the defendant raised objections to those documents cannot be marked as exhibits. They also produced an application/notice moved by plaintiff's counsel for production of original documents and its reply given by the defendants counsel. Both the parties are still at dispute that "Whether emails and other document which are in possession of the other party can be marked as Exhibits or Annexure?"

(The photocopies of application/Notice and its reply are enclosed herewith)

In view of above, the undersigned submits the commissioner report to this Honourable Court for passing the appropriate order."

2. As is apparent from the report filed by the Commissioner, pursuant to an order of this Court dated 27 September 2022 a Commissioner was

appointed to record evidence of the parties in this *lis*. The Plaintiff submitted, to the Commissioner, an Affidavit-in-Evidence on 12 January 2023 and to which were inter alia appended **photocopies** of emails. It seems that during the production of evidence, the Plaintiff had served on the Defendant a notice under Order XII Rule 8 of the Code of Civil Procedure, 1908 read with Article 76 and Article 77 of the Qanun e Shahdat Order, 1984 to produce various emails and to also produce a receipt confirming the transfer of certain monies. This was replied to by the Defendant denying possession of the originals of the emails and stating that they were in fact in the possession of the Plaintiff. The Defendant, on this basis produced “photocopies” of emails and which are now being challenged by the Defendant before the Commissioner as not being subject to being adduced as primary evidence. This has led to a query from the Commissioner who has in his report requested that the status of the e-mails being primary or secondary evidence may be determined by this Court before any further evidence is adduced.

A. Contentions of Mr. Muhammad Umer Lakhani on behalf of the Plaintiff

3. Mr. Muhammad Umer Lakhani assisted by Mr. Ishfaq Ahmed Advocate had entered appearance on behalf of the Plaintiff and has contended that on the basis of Explanation 3 and Explanation 4, that has been inserted into Article 73 of the Qanun e Shahadat Order, 1984 by Section 29 of the Electronic Transactions Ordinance, 2002, a printout of an email can be adduced as Primary Evidence and no objection in this regard can be made by the Defendants. He further contended that as there was little difference as between a photocopy of a printout of an email and the printout itself, the objection being raised is highly technical.

4. They contended that before the amendment to Article 73 of the Qanun e Shahadat Order, 1984 such evidence was always admissible as Primary Evidence on account of Article 73 being read with Article 164 of the Qanun e Shahadat Order, 1984 and the interpretation of which has been put to rest by virtue of Explanation 3 and Explanation 4 to Article 73 of the Qanun e Shahadat Order, 1984. He relied on a decision of a learned Single Judge of this Court reported as **Taimoor Mirza vs. Maliha Hussain and others**¹ and a decision of a learned Single Judge of the Islamabad High

¹ 2020 CLC 1029

Court reported as *Mehmood Alam Sher vs. HEC and others*² in support of his contentions.

B. Contentions of Mr. Ahmer Jamil Khan on behalf of the Defendant

5. Mr. Ahmer Jamil Khan entered appearance on behalf of the Defendant and also referred to Article 73 and Article 74 of the Qanun e Shahadat Order, 1984. To interpret the provisions of Explanation 3 and Explanation 4 to Article 73 of the Qanun e Shahadat Order, 1984 Mr. Ahmer Jamil Khan referred to the provisions of Sub-Sections (g) (p) and (x) of Section 2 of the Electronic Transactions Ordinance, 2002 which respectively define the expressions “automated,” “information system,” and “security procedure,” as used in the Explanations. Referring to such expressions in the context of Explanation 3, he contended that the expression “automated information system,” as defined, could not include manually typed emails or messages and as all information systems required some form of manual intervention, the use of that expression in the explanation would exclude the production of any electronic document that were made with any human intervention.

6. In respect of Explanation 4 he contended that while a printout of an email could come within the purview of Explanation 4, he contended that as the Plaintiff had instead of producing printouts, attempted to produce photocopies of printouts, such photocopies could only be considered as secondary evidence. On this basis, he distinguished the decisions relied on by Mr. Muhammad Umer Lakhani and contended that each of those decisions did not consider the question as to the status of a photocopy of an email being adduced as evidence being either primary evidence or secondary evidence.

7. Explaining that information systems can be both automated or manual, he contended that emails are information systems that are referred to as a “store and forward model.” Regarding the production of emails as evidence he contended that most emails are not formatted as plain text and rather are formatted as Hypertext Mark Up Language (HTML) and which can also create dynamic content which is capable of being changed or replaced. He further contended that such formatting can also contain an “iframe” which cross references the email with a webpage and which too

² 2022 CLC 1337

can be changed. He emphasised that on account of the ability to make such changes to emails it is difficult to ascertain the authenticity of an email. He further clarified that it was also possible to tamper with emails by a process referred to as “spoofing” i.e. where someone or something forges the sender's information and pretends to be a legitimate source, business, colleague, or other trusted contact for the purpose of gaining access to personal information, acquiring money, spreading malware, or stealing data and which therefore require authentication through security measures such as developing Sender Policy Frameworks, Standardised DNS Record, IP Addresses DomainKeys Identified Mail, Domain based Message Authentication Reporting and Conformance, and e-signatures using public key cryptography to verify their authenticity.

8. Concurrently with the issues relating to the production and authenticity of emails, he contended that there was a further issue of the production of attachments to emails in evidence and which he contended could broadly be classified in the following categories:

- (a) attachments which are original electronic documents;
- (b) attachments which are images of physical documents;
- (c) other attachments; and
- (d) links which may be sent in an email.

and which need to be considered independently in the context of whether or not they would classify as primary evidence or secondary evidence. His contentions regarding the classification of each of these forms of attachments as either primary evidence or secondary evidence is as hereinafter:

(i) Attachments which are original electronic documents

Mr. Ahmer Jamil Khan contended that attachments produced in the form of printouts of a PDF file, a Word document, an Excel file etc., with or without e-signatures, should be considered as original electronic documents and which may be produced separately as primary evidence when producing the emails, they were sent with.

(ii) Attachments which are images of physical documents

He further contended that attachments such as images of physical documents, or scanned copies of physical documents which can also be attached to emails, either as an image file, or a PDF file ought not to be treated as original electronic documents, but rather as copies of original documents and hence produced as secondary evidence within the meaning of Article 74 of the Qanun-e-Shahadat Order, 1984, subject to fulfilling the requirements stated therein.

(iii) Other Attachments

Regarding other attachments such as original pictures or videos attached to emails could be treated as primary evidence, however, pictures of documents should not be treated as primary evidence of the documents.

(iv) Links Sent in an Email

Finally, he contended that in the absence of proof of the contents of the link at the time of delivery or receipt regarding hyperlinks sent in an Email, considering that the information available at such links may change at any time, contents of such links may not be taken in evidence.

9. I have heard Mr. Muhammad Umer Lakhani, Mr. Ishfaq Ahmed Advocate and Mr. Ahmer Jamil Khan and have perused the Commissioner Report.

C. The Opinion of this Court

(i) Electronic Documents as Primary or Secondary Evidence

(a) The Relevant Provisions of the Qanun e Shahdat Order 1984 and the Electronic Transactions Ordinance, 2002

10. Article 72 of the Qanun e Shahadat Order, 1984 prescribes the manner in which evidence can be adduced as to a document and wherein it is clarified that:

“ ... 72. *Proof of contents of documents:*

The contents of documents may be proved either by primary or by secondary evidence.

Having classified, documents into two distinct categories i.e. Primary Evidence and Secondary Evidence, the difference between such evidence has been clarified in Article 73 and Article 74 of the Qanun e Shahadat Order, 1984 and which provisions originally read as hereinunder;

“ ... 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

Illustrations

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

74. Secondary evidence: *“Secondary evidence means and includes –*

(1) certified copies given under the provisions hereinafter contained ;

(2) copies made from the original by mechanical process which in themselves insure the accuracy of the copy, and copies compared with such copies ;

(3) copies made from or compared with the original.

(4) counterparts of documents as against the parties who did not execute them ;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

(a) A photograph of an original is secondary evidence of its contents though the two have not been compared if it is proved that the thing photographed was the original.

(b) A copy, compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original."

11. By virtue of Section 29 of the Electronic Transactions Ordinance, 2002 certain amendments, identified in the Schedule to the Electronic Transactions Ordinance, 2002, were made to the Qanun e Shahadat Order, 1984 and by virtue of which the following Explanations are to be read into Article 73 of the Qanun e Shahadat Order, 1984:

" ... *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 time.*

"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."

In addition, through the same Section the expressions "automated," "electronic," "electronic document," "information systems" and "security procedure" have also been defined and are also, on account of section 29 of the Electronic Transactions Ordinance, 2002 to be "read into" the Qanun -e Shahadat Order, 1984 and which are reproduced hereinunder:

" ... (g) "automated" means without active human intervention; ...

(l) "electronic" includes electrical, digital, magnetic, optical, biometric, electrochemical, wireless or electromagnetic technology;

(m) "electronic document" includes documents, records, information, communications or transactions in electronic form; ...

(p) "information system" means an electronic system for creating, generating, sending, receiving, storing, reproducing, displaying, recording or processing information;" ...

(x) "security procedure" means a procedure which:

(i) is agreed between parties;

(ii) is implemented in the normal course by a business and which is reasonably secure and reliable; or

(iii) in relation to a certificate issued by a certification service provider, is specified in its certification practice statement; for

establishing the authenticity or integrity, or both, of any electronic document, which may require the use of algorithms or codes, identifying words and numbers, encryption, answer back or acknowledgement procedures, software, hardware or similar security devices;"

12. The manner in which such explanations are to be considered have been opined on by the Supreme Court of Pakistan in the decision reported as **Commissioner Inland Revenue, Lahore vs. Millat Tractors Limited, Lahore**³ and wherein it was held that:

“ ... 14. Before dilating upon the applicability of the Explanation to the matters at hand, it would be appropriate to understand the rationale behind introducing an Explanation in an enactment. The purpose of an Explanation is ordinarily to **explain some concept** or expression or phrase occurring in the main provision. It is not uncommon for the legislature to accord either an extended or restricted meaning to such concept or expression by inserting an appropriate Explanation. Such a clarificatory provision is to be interpreted according to its own terms having regard to its context and not as to widen the ambit of the provision. As a general rule, an explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows, it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. **The object of adding an Explanation to a statutory provision is only to facilitate its proper interpretation and to remove confusion and misunderstanding as to its true nature.** It is relied upon only as a useful guide or in aid to the construction of the main provision. It is in this view of its effect that courts have normally given retrospective effect to such clarificatory or declaratory provisions in the shape of an Explanation.

15. However, where the effect of the Explanation warps out of its normal purpose explained above, and acts as a substantive enactment or deeming provision, or enlarges substantive provisions of law or creates new liabilities, such an Explanation cannot be given retrospective effect unless the express language of the Explanation warrants such an interpretation. It is settled law that a change in substantive law which divests and adversely affects vested rights of the parties shall always have prospective application unless by express word of the legislation and/or by necessary intendment/implication such law has been made applicable retrospectively. As a cardinal principle of interpretation of statutes, tax statutes operate prospectively and not retrospectively unless clearly indicated by the legislature, therefore, retroactivity cannot be presumed. Where an insertion or deletion of any provision in the rules or the law is merely procedural in nature, the same would apply retrospectively but not if it affects substantive rights which already stood accrued at the time when the un-amended rule or provision was in vogue. A provision curtailing substantive rights does not have retroactive operation unless the legislature elects to give it retrospective effect. Thus, where existing rights are affected or giving retroactive operation causes inconvenience or injustice, the Court will not favour an interpretation giving retrospective effect even where the provision is procedural. ...”

³ 2024 SCMR 700; See also **Muhammad Salman vs Naveed Anjum** 2022 SCMR 42; **Commissioner Inland Revenue RTO, Rawalpindi vs. Trillium Pakistan (Pvt.) Ltd., Rawalpindi** 2019 SCMR 1643; **Commissioner of Income Tax, Legal Division, Lahore vs. Khurshid Ahmad** PLD 2016 Supreme Court 545; **Naveed Textile Mills Ltd. Vs. Assistant Collector (Appraising), Custom House, Karachi** PLD 1985 Supreme Court 92; **Muhammad Hussain Patel vs. Habib Wali Muhammad** PLD 1981 Supreme Court 1; **Messrs Rahmania Trading Company vs. Messrs Eagle Star Insurance Company, Ltd.** PLD 1969 Supreme Court 202.

To summarise, “Explanations” are provided in statutes to facilitate a proper interpretation of sections of a statute and to assist in the removal of any confusion that may exist in the language therein. The explanation however, cannot create or extinguish any rights or obligations and are therefore simply a guide to aid in the construction of a statute.

(b) Automated Information Systems and Electronic Documents

13. With the advent of the age of information technology, it has come to pass that information can be stored and retrieved from what are referred to as “information systems” and documents which previously were only scribed have now come to be re-classified in both “electronic” and “non-electronic” forms. A further classification has also been made of such information systems that record information and which are sub-divided into two distinct forms of information systems i.e. “Automated Information Systems” and “Manual Information Systems.” A “Manual Information System” would be an information system whereby data is entered into the system manually i.e., by a human being. That system is to be contrasted with a system where information is entered through an automated process e.g. scanning coupled with a program based on a system of algorithms and whereby a machine would read the data itself and on the basis of the algorithm process the data and maintain an information system. The process being devoid of human intervention, such a system is referred to as an “Automated Information System.”

14. The distinction between “Automated Information Systems” and “Manual Information Systems” has been statutorily recognised in Explanation 3 and Explanation 4 of the Article 73 of the Qanun e Shahdat Order, 1984. On account of the use of the expression “automated” in Explanation 3, being defined in Sub-Section (g) of Section 2 of the Electronic Transactions Ordinance, 2002 as being without “active human intervention,” when evidence is produced through a printout or by any “other form of output” of information that is part of an automated information system i.e. that is an information system that is not based on “active human intervention,” the same would be treated as primary evidence. The production of such documents is premised on a presumption that the “automated information system was in working order at all material times” and which presumption would have to be rebutted by the person disavowing such a document by adducing evidence to show some defect existed in the automated information system at a material time e.g. when the document

which is sought to being adduced in evidence is extracted from the automated information system or when the data on the basis of which the document which is sought to being adduced in evidence was based is entered into the automated information system. Clearly, if such a presumption as to as the working of the “automated information system” is not rebutted, the document produced from the automated information system in the form of a printout or “in another form of output” e.g. Universal Serial Bus (USB) or Compact Disc (CD) would be admissible as primary evidence.

(c) **Emails**

15. By contrast, Explanation 4 to Article 73 of the Qanun e Shahadat Order, 1984 clarifies that where any “electronic document” as defined in Sub-Section (m) of Section 2 of the Electronic Transactions Ordinance, 2002 is being adduced “through a printout or other form of reproduction” the same would only be treated as primary evidence “where a security procedure was applied at the time when it was generated, sent, received or stored.” If such a security procedure was not applied at the it when the information was “generated, sent received or stored” then it would have to be classified as “secondary evidence.”

16. The expression “electronic document” as defined in Sub-Section (m) of Section 2 of the Electronic Transactions Ordinance, 2002 being defined so as to “include” is not an exhaustive definition⁴ and would, on account of the expression “communication” being used therein, clearly permit evidence of e-mails being adduced in electronic form provided that a security procedure is applied at the time when the information was “generated, sent received or stored.” What is to be considered as being a “Security Procedure” has been clarified in Sub-Section (x) of Section 2 of the Electronic Transactions Ordinance, 2002 and which clarifies three separate forms of such security procedures. The first would be a procedure to store or authenticate information as had been agreed as between the parties e.g. as a part of term of a written agreement or where the parties have through their actions or conduct accepted such a procedure. The second would be security procedure that would be implemented in the “normal course of

⁴ See Diworth vs. New Zealand Commissioner of Stamps 1829 AC 99; Followed in Messrs Osmania Glass Sheet Factory Ltd., Chittagong v. Sales Tax Officer, Chittagong P L D 1971 Supreme Court 205; Mushtaq Ahmed vs. The State 1992 SCMR 543; Don Basoco High School vs. The Assistant Director PLD 1989 SC 128; Pir Shah Mardan Shah and 3 others vs Chief Land Commisioner Sindh and 2 others PLD 1974 Karachi 375.

business and which is reasonable secure and reliable” e.g. passwords to accounts. The third would be where such a security procedure is confirmed by a certificate issued by a certification security provider in its practice statement confirming as to the authenticity and/or the integrity of the electronic document which has been generated on the basis of “algorithms or codes, identifying words and numbers, encryption, answer back or acknowledgement procedures, software, hardware or similar security devices.”

17. I am in no doubt that an email is stored on and is part of an “information system” and which on account of “active human intervention” in the creation of an email would be excluded from the purview of an “automated information system” and would therefore in terms of Explanation 4 of Article 73 of the Qanun -e- Shahadat Order, 1984 read with Sub-Section (m) of Section 2 of the Electronic Transactions Ordinance, 2002, being a “communication” be considered as an “electronic document” and be classified as “primary evidence” provided that a “*security procedure was applied thereto at the time it was generated, sent, received or stored.*” As is obvious, every e-mail system requires a personalised password prior to a person accessing such an information system and which to my mind would permit e-mails to being considered as being the subject of a “security procedure” in terms clause (ii) of sub-section (x) of Section 2 of the 2002, Ordinance i.e. which is “*implemented in the normal course by a business and which is reasonably secure and reliable.*” That being the case and Explanation 4 clearly permitting the **printout** of such an email to being adduced, when submitted the same must be classified as primary evidence and which would, after being produced, be subject to challenge as any other form of primary evidence during a deposition.

18. But what about a photocopy of a printout of an email? It would seem that the expression “other form of reproduction” used in Explanation 4 of Article 73 of the Qanun e Shahadat Order, 1984 could be interpreted widely to include a photocopy of a printout of an email. It is noted that such an expression is to be contrasted within the expression “other form of output” that is used in Explanation 3 of Article 73 of the Qanun e Shahadat Order, 1984 and which raises a particular problem as to whether the expression “reproduction” used in Explanation 3 of Article 73 of the Qanun e Shahadat Order, 1984 would overlap with the expression “copy” as used in Article 74

of the Qanun e Shahadat Order, 1984. I have considered the definition of each of these expressions which are defined as hereinunder:⁵

“ ... *Copy* A. noun A piece of written or printed matter that reproduces the contents of another;...”

“ ... *Reproduction.* A copy esp. of a work of art, a print or photograph of a painting...”

As is apparent, Sub-Article (2) and Sub-Article (3) of Article 74 of the Qanun -e- Shahadat Order, 1984 specifically clarifies that “*copies made from the original by mechanical process which in themselves insure the accuracy of the copy*” and “*copies made from or compared with the original*” are to be considered as “secondary evidence.” If one is to consider the dictionary definition of each of these expressions what becomes transparently apparent is that the two expressions i.e “copy” and “reproduction” would mean one and the same thing and hence a reproduction of a printout e.g. a photocopy would be classifiable as primary evidence under Explanation 3 as well as secondary evidence under Explanation 4. However as clarified by the Supreme Court of Pakistan, Explanations given are not binding and in respect of a section of a statute are there to “*facilitate its proper interpretation and to remove confusion and misunderstanding as to its true nature*” and certainly not to cause more “confusion and misunderstanding”. To my mind the expression “other form of reproduction” of an electronic document that is being referred to in Explanation 4 should therefore not be interpreted literally but should be considered to be any form of production other than copies as referred to in Sub-Article (2) or Sub-Article (3) of Article 74 of the Qanun -e- Shahadat Order, 1984 and which would continue to be classified as Secondary Evidence. I would not attempt to exhaustively define what could be classified as “other form of reproduction” but I am clear that this would be broader than and consume what would come within the expression “other form of output” as used in Explanation 3 of Article 73 of the Qanun e Shahadat Order, 1984 and resultantly copies of email if produced through a Universal Serial Bus (USB) or Compact Disc (CD) would also be admissible as primary evidence.

19. I have considered the two orders relied on by Mr. Muhammad Umer Lakhani and Mr. Ishfaq Ahmed Advocate and which while considering the general admissibility of emails do not consider the interpretation of the provisions of Article 73 and Article 74 of the Qanun e Shahadat Order, 1984

⁵ Brown, L (2002) *Shorter Oxford English Dictionary* Fifth Edition, Oxford

in the subjective context as has occurred in this suit and either way are not binding on me. Before concluding on this issue, I would say that It is apparent that the difference that has been made by me as between a printout, being a reproduction of an electronic document and a photocopy of the printout would, as rightly contended by Mr. Muhammad Umer Lakhani and Mr. Ishfaq Ahmed Advocate, amount to splitting hairs. However, to read otherwise would be to discriminate as between copies made of electronic and non-electronic documents and which would make nonsense of Sub-Article (2) and Sub-Article (3) of Article 74 of the Qanun e Shahahdat order, 1984. I am therefore of the opinion that while a printout of an email would amount to primary evidence a photocopy of the printout would not and would be classified as secondary evidence.

(ii) Order XII Rule 8 of the Code of Civil Procedure, 1908

20. The provisions of Rule 8 of Order XII of the Code of Civil Procedure, 1908 read as hereinunder:

“ ... 8. Notice to produce documents shall be in Form No.12 in Appendix C with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.”

The provisions of this Rule permit a litigant, who claims that he does not have in their custody certain original documents and which he also contends are in the possession of the opposition, a right to issue a notice to the opposition to call on them to produce the originals of those documents. Such a notice can be responded to either by the production of the originals of the documents or by contending that the documents are not in the custody of that party and whereafter the litigant who has issued the notice would be within his right to produce a copy of the original of the document as secondary evidence.

21. Now in the context of an email, either if sent or received, copies of both will be available with either party in their inbox and a printout of which can be produced by either side as primary evidence. If, however the e-mail being relied on was not sent or received by the person seeking its production or for whatever reason is not available with them e.g. they deleted it from their inbox; the issuance of a notice under Rule 8 of Order XII of the Code of Civil Procedure, 1908 if issued and responded to by the

opposing party, as in the case in hand, as not being in their custody, would permit such documents being adduced as secondary evidence.⁶ In the circumstances, as the Plaintiff had issued a notice under Rule 8 of Order XII of the Code of Civil Procedure, 1908 and which has been responded to by the Defendant stating that they do not have the originals of the documents, the Plaintiff is within his right to adduce such photocopies as secondary evidence.

(iii) The Marking of Documents as Exhibits

22. The last issue that has been raised by the Commissioner is as to the manner in which a document that is produced in evidence should be marked i.e. either as an Exhibit or as an Annexure on the basis of whether they are primary evidence or secondary evidence respectively. I am aware that such a practice has existed in this Court for many years, but I do not see any statutory basis for such a practice. To my mind whatever evidence is adduced should be exhibited and any objections on the documents as to its admissibility noted in the deposition recorded by the commissioner and the status of which can be determined by a Court at the time of the final hearing of the suit.

23. The Commissioner Reference stands disposed of in the above terms with the further observation that the time period for recording evidence is extended by a further six months.

J U D G E

Karachi dated 18 January 2025

⁶ *Cooperative Textile Mills Limited vs. Sultan Textile Mills* 1983 CLC 452