JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

R.F.A No. 150/2016

CMPAK LIMITED, ISLAMABAD.
Vs.
NAZIR HUSSAIN SHAH, PROPRIETOR OF NES ENGINEERING SERVICES, ISLAMABAD.

Appellant by	**:**	**M/s Hafiz Arfaat Ahmad, Ch. Tariq Zaman Ch. and Izrar Ali, Advocates.**
Respondent by	**:**	**M/s M. Izzat Khan and Ahsan Daud, Advocates.**
Date of hearing	**:**	**17.01.2022**

SAMAN RAFAT IMTIAZ, J. Through instant Regular First Appeal, the Appellant has assailed the Judgment and Decree dated 30.04.2016 ("Impugned Judgment & Decree") passed by the learned Civil Judge (East), Islamabad, whereby the Suit for Recovery of Rs.4,439,800/- filed by the Respondent /Plaintiff has been partially decreed.

2. Facts in brief as per the Plaint are that in the year 2001, Respondent/Plaintiff entered into an agreement with the Appellant Company/Defendant No.1 for installation and maintenance of air conditioners in the offices of Appellant/Defendant No.1 for a period of one year, which agreement was extended from time to time up to year 2013. On 08.04.2014, some outstanding bills amounting to Rs. 2,219,900/- were sent to the Appellant/Defendant No.1 by the Respondent/Plaintiff. Respondent/Plaintiff also requested for renewal of contract, however, the contract was not renewed but services were availed from the Respondent and in the month of May, 2014, the Appellant/Defendant No.1 completely stopped availing the services of the Respondent's/Plaintiff's staff. The

Respondent/Plaintiff claimed to have suffered mental torture apart from economic crisis and as such claimed double the actual outstanding amount vide suit for recovery of Rs.4,439,800/- on account of outstanding dues and damages/compensation against the Appellant/Defendant No.1.

3. The Appellant/Defendant No. 1 vide its Written Statement denied that there was any agreement with the Respondent/Plaintiff i.e. Mr. Nazir Hussain but admitted existence of a Service Level Arrangement in the year 2011 with NES Engineering Services ("**NES**"), which was allegedly terminated by the Appellant on 25-10-2011. Thereafter, a fresh agreement was executed between the parties on 15-05-2012 which was valid till 30-04-2013 but which was further extended vide 1st Amendment dated 21-05-2013 till 30-11-2013.

4. Out of the divergent pleadings of the parties, the learned Trial Court framed the following issues:-

i. Whether the plaintiff is entitled to a decree as prayed for? OPP
ii. Whether the plaintiff has no cause of action and *locus standi* to file the instant suit against the defendants? OPD
iii. Whether the defendants are entitled to receive special cost under section 35-A CPC? OPD
iv. Relief.

5. Issue No. 1 was divided into actual damages and damages for mental torture. Insofar as damages for mental torture are concerned, the learned Trial Court held that the Respondent/Plaintiff failed to prove the same. Whereas, actual damages were further divided into the following seven claims:

S. No.	**Nature of services provided by the plaintiff company**	**Amount Pak. Rs.**
1	Maintenance services of air conditioners from July 2011 to April 2012.	1,432,000/- (Based on old rates)
2	Additional work of shifting of air conditioners and installation in Blue Area.	261,000/-
3	Additional work of shifting of air conditioners at TF Complex.	127,300/-

4	Installation of New ACs	105,000/-
5	Outstanding payment against services provided to Zong c/o Besto.	21,000/-
6	Monthly contract charges from November 2013 to March 2014.	196,000/- (Nov.2013 to April 2014 according to new biding rates)
7	Additional work of shifting of air conditioners at TF Complex.	77,600/- (According to new rates)
	Total actual outstanding amount	2,219,900

6. The learned Trial Court, after hearing the learned Counsel for the parties, partially decreed the Respondent's/Plaintiff's suit to the extent of claims at Serial Nos. 1 to 4 whereas claims at Serial Nos. 5 to 7 were declined vide the Impugned Judgment and Decree Issues Nos. 2 and 3 were held infructuous on account of the decision in respect of Issue No. 1 and relief under Issue 4 was given accordingly.

7. Appellant/Defendant No.1, being aggrieved of the Impugned Judgment and Decree filed present Regular First Appeal for setting aside the same.

8. Arguments heard and record perused.

9. We have examined the Impugned Judgment & Decree of the learned Trial Court in light of the pleadings of the parties, the evidence produced, and the arguments submitted before us by both the learned counsel. The thrust of the arguments submitted by the learned counsel for the Appellant was that the Respondent failed to discharge his burden of proof as no agreement or service completion certificate was produced and that the Appellant had paid all due amounts. In support, the learned counsel relied upon the cases of ***Jamshed Ahmed Khan Dasti Vs. The State 2013 CLC 1501, Babap Enterprises Vs. United Bank Limtied 2011 CLC 1534, Allah Wasaya Vs. Yar Muhammad 2015 MLD 272, Muhammad Ashraf Vs. Muhammad Tahir Ismail 2011 MLD 1848, State Life Insurance Corporation of Pakistan Vs. Javaid Iqbal 2011 SCMR 1013,***

Chaudhary Wajid Ayub Vs. Malik Rizwan Ahmed PLD 2020 Islamabad 250, Asif Ali Hashmi Vs. Muhammad Arif Mian PLD 2015 Islamabad 191 and ***Pakistan Engineering Consultants Vs. Pakistan International Airlines Corporation PLD 2006 Karachi 511***.

10. On the other hand, the learned counsel for the Respondent laid great stress on the fact that Appellant gave evasive replies in its Written Statement and that they failed to cross examine the Respondent's witnesses on documents produced into evidence, which according to the Respondent's legal counsel constituted admissions. The learned counsel for the Respondent cited the cases of ***Syed Muhammd Ali Shah Vs. Syeda Kalsoom Hassan 2012 MLD 23, Ali Haider Vs. Mubarak Din Khan 2012 YLR 1598, Abdul Rehman Vs. Zia-ul-Haque Makhdoom 2012 SCMR 954, Ghulam Nabi Vs. Tahir Abbas 2006 CLC 546, Din Muhammad and Subedar Muhammad Zaman 2001 SCMR 1992, Muhammad Akhtar Vs. Mst. Manna 2001 SCMR 1700, Aminul Haq Vs. Abdul Wasai 2004 CLC 555, Mst. Farida Bano Vs. Karachi Electric Supply Corporation 2008 MLD 62, Wahid Bakhsh Vs. Ameer Bakhsh 2015 CLC 1387, Binyameen Vs. Chaudhry Hakim 1996 SCMR 336*** and ***Muhammad Iqbal Vs. Mehboob Alam 2015 SCMR 21.***

11. The dispute under Issue No. 1 as framed by the learned Trial Court is essentially regarding payment of services allegedly provided by the Respondent to the Appellant under a contract which was admittedly in existence in the year 2011 and thereafter renewed from time to time. Therefore, the initial burden of proof was upon the Respondent.

12. It is observed first and foremost that the alleged agreement from 2001 between the parties is a marked document and as such cannot be considered as

evidence. The alleged extensions of such agreement were admittedly not produced into evidence. Although the Appellant has not denied the existence of the contract, it is not possible to ascertain the terms and conditions agreed upon between the parties especially regarding payment of bills without such agreement. The Respondent has, therefore, failed to show any mechanism that was agreed upon between the parties which would establish completion of work, timeline for raising invoices, period within which payment was to be made, effect of delayed performance including payment, etc.

Claim at Serial No. 1

13. Be that as it may, it appears that the learned Trial Court has allowed the Respondent's entire claim at Serial No. 1 listed in the box in para 5 herein above solely on account of the Appellant's failure to cross-examine the Respondent on Bills No. 464, 490, 474, and 491 exhibited as part of Ex-P3/1-88. It is noted that Bill No. 491 is purportedly for service charges for the months of July, August, and September, 2011; Bill No. 490 for the months of October, November, and December, 2011; Bill No. 464 for the months of January, February, and March, 2012; and Bill No. 474 for the month of April, 2012. However, the amounts as per the aforesaid bills aggregate to Rs. 680,000/- whereas the amount claimed by the Respondent and decreed by the learned Trial Court for the period between July, 2011 and April, 2012 is Rs. 1,432,000/.

14. It appears that the learned Trial Court has also relied upon Bills No. 483, 492, 495, and 015 which were not exhibited but were in fact marked documents. Time and time again this Court as well as the Honorable Supreme Court has held in various judgments including in the cases of ***State Life Insurance Corporation of Pakistan Vs. Javaid Iqbal 2011 SCMR 1013, Chaudhary Wajid Ayub Vs.***

Malik Rizwan Ahmed PLD 2020 Islamabad 250, Asif Ali Hashmi Vs. Muhammad Arif Mian PLD 2015 Islamabad 191 and ***Pakistan Engineering Consultants Vs. Pakistan International Airlines Corporation PLD 2006 Karachi 511*** relied upon by the Appellant that documents not produced but only marked cannot be considered by Courts as legal evidence of fact. Therefore, the Trial Court was not justified in decreeing the Respondent's suit to the extent of Rs.752,000/- in reliance upon Bills No 483, 492, 495, and 015, which were not produced in evidence by the Respondent but were merely marked.

15. As far as Bills No. 491, 490, 464 and 474 are concerned, it is noteworthy that they are self-generated documents of the Respondent which do not bear any acknowledgment of receipt by the Appellant nor was any other proof of receipt produced by the Respondent in evidence. In fact, according to para 7 of the Plaint, the allegedly outstanding bills that are the subject matter of the instant suit including Bills No. 491, 490, 464 and 474, which pertain to the period between July, 2011 till April, 2012 were sent to the Appellant vide letter dated 08-04-2014. No explanation has been proffered by the Respondent for sending such bills belatedly.

16. The Respondent as PW-1 admitted on cross-examination that the Appellant used to issue work completion certificates, however, despite such admission the Respondent failed to produce any such completion certificate which would justify the alleged bills. On the other hand, DW 1 and 2 categorically stated that Appellant was in the practice of issuing work completion certificates but no cross-examination was conducted on this account. The said bills bear a notation that completion reports are attached, however, the purported maintenance reports that are available on subsequent pages do not contain any information which would

connect them to the said Bills. Although these maintenance reports contain signatures at the bottom described as *"Client Signature"* but the Appellant's witnesses were not cross-examined in this regard.

17. In view of the foregoing reasons, said Bills are not reliable proof especially in light of the Appellant's denial in its Written Statement whereby the Appellant categorically denied that the Respondent performed its obligations from April, 2011 till October, 2011 which lead to the Appellant allegedly terminating the agreement with the Respondent on October 25, 2011. Unfortunately, the alleged termination letter dated October 25, 2011 is also a marked document. Nevertheless, the burden of proof with regard to provision of services to the Appellant from July till October, 2011 in the amounts as per Bills No. 490 and 491 was on the Respondent who failed to discharge such burden.

18. As far as the learned Trial Court's conclusion on the basis of the Appellant's failure to cross examine the Respondent's witness regarding the Bills No. 490 and 491 is concerned, we are guided by the ruling in the case of ***Shazia Qamar Vs. Bashiran Bibi, 2016 CLC 15***, wherein our learned brother, his lordship Mr. Justice Athar Minallah very lucidly explained as follows:

> *"10. It is obvious from the above that where a party has omitted or failed to cross examine a witness on a particular question of fact stated in the Examination-in-Chief, then it would give rise to a presumption that such fact is admitted. This presumption is, however, neither absolute nor infallible. The presumption is open to exceptions.* ***The statement made during the Examination-in-Chief and not controverted in the cross examination, nevertheless, is to be construed in the light of the pleadings of the parties and the other evidence produced and placed on record.*** *Such a presumption can, therefore, be displaced by reliable, cogent and clear evidence. If there is other evidence then it will be determined on the basis of preponderance of evidence or balance of probability, whether a party upon whom the burden of proof lies has been able to discharge the same.*
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> *11. In the instant case the onus to prove issue number 1 was on the respondent No.1. She, inter alia, had to prove that there was an oral agreement with the petitioner No.1 to return/refund the amount deposited in her account after the student visa had been issued by the High Commission. On the basis of preponderance of evidence, it is obvious that the respondent No.1 could not prove issue No.1, including the existence of an oral agreement.* ***The absence of a cross-examination or controverting the fact deposed by the respondent No.1 in her Examination-in-Chief does not give rise to a presumption of admission, as the same is displaced by the assertions in the written statement and the***

> ***evidence on record.*** *The respondent No.1, therefore, could not prove issue No.1. It is also established law that the case of a party has to stand on its own legs and the plaintiff cannot take advantage of the weakness of the Defendant. The learned trial court did not consider the evidence and pleadings while deciding issue No.1."* [Emphasis added].

19. Similarly in the case at hand, no presumption of admission arises from the Appellant's failure to conduct cross-examination of the Respondent's witnesses in respect of Bills Nos. 490 and 491 to the extent of the period from July, 2011 till October, 2011, given that the Respondent failed to discharge his initial burden of proof in respect thereof.

20. The period from November, 2011 till April, 2012 is partly covered under Bill No. 490 and the remaining, under Bills No. 464 and 474. In this regard, the Appellant did not categorically deny receiving services from the Respondent rather gave an evasive reply was given in the Written Statement that there was no subsisting agreement between the parties for such period due to which the Respondent is estopped from claiming charges for such period.

21. In the case of ***Khalid Hussain versus Nazir Ahmed, 2021 SCMR 1986***, the Honorable Supreme Court eloquently observed that *"There is no cavil to the proposition that the onus to prove the claim is ordinarily on the person moving the Court to seek relief as he is the one who is to fail if no evidence at all is given by the other side. However, when the contesting party takes up a defense and desires the court to pronounce judgment as to his legal right dependent on the existence of facts which he asserts then the onus to prove those facts lies on him. It is after the parties have produced their respective evidence that the court in a civil case is to consider and evaluate the evidence on the preponderance of evidence. It is on whose side the scale of evidence tilts would emerge as the victor and be awarded the positive verdict."* Considering the facts of the case at hand from this perspective what emerges is that existence of the agreement in 2011 and its

subsequent extensions as alleged by the Respondent have not been denied by the Appellant and as such stand admitted. However, the termination of such agreement in October, 2011 and execution of fresh agreement in May, 2012 was alleged by the Appellant, therefore, the burden to prove the same was also on the Appellant. However, neither the Appellant was able to prove the same through any cogent evidence nor did the Respondent admit such allegation. Even if it is assumed for the sake of argument that the agreement was in fact terminated in October, 2011 and no fresh agreement was executed by the parties till May, 2012, that by itself does not negate the allegation that services were provided by the Respondent and availed by the Appellant during such time.

22. Having said that it is noted that the Appellant has also asserted in paragraph 10 of its Written Statement that *'Paragraph 6 of the plaint is vehemently denied as stated."* In like circumstances, the Honorable Supreme Court in the case of ***Haji Abdul Ghafoor Khan Vs. Ghulam Sadiq, PLD 2007 SC 433,*** held that the evasive denial does not amount to an admission within the scope of Rule 5 of Order VIII, C.P.C. Therefore, keeping the totality of circumstances in view, we are not persuaded that there is sufficient evidence on the record to conclude that the Respondent did provide services to the Appellant from November, 2011 till April, 2012 in the absence of any work or purchase order raised by the Appellant for provision of services during this period and/or work completion certificates issued by the Appellant confirming provision of services (which the Appellant was admittedly in the practice of issuing) simply because the Appellant failed to cross-examine the Respondent on self-generated bills produced by the same i.e., Bills No. 490, 464, and 474. We are, therefore, constrained to hold that the scale of evidence does not tilt in favor of the Respondent and on the basis of preponderance of evidence, we hold against the Respondent in respect of **Serial No. 1**.

Claims at Serial No. 2 and 4

23. As far as the Respondent's claim in respect of **Serial No. 2** listed in the box in para 5 herein above is concerned, the learned Trial Court has allowed the same based on the Appellant's failure to cross-examine the Respondent in respect of Bill No. 472 produced by him as part of Marked Ex-PH/1-26 (not Ex-P3 as incorrectly stated in the Impugned Judgment). Similarly, the learned Trial Court has allowed Respondent's entire claim in respect of **Serial No. 4** based on the Appellant's failure to cross-examine the Respondent in respect of the Bills No.442, 448, 428, 461, 484, 463, and 443 produced by him as part of Marked Ex-PH/1-26 (not Ex-P3 as incorrectly stated in the Impugned Judgment). It is noted that no bill bearing number 484 was found on the record.

24. It has already been noted above in light of case law that marked documents cannot be considered as legal evidence and as such the occasion for the Appellant to cross examine the Respondent's witnesses on such documents simply did not arise. The end result is that the Respondent failed to tender any evidence, whatsoever, in respect of these claims. Hence, the claims under Serial Nos. 2 and 4 are declined due to Respondent's failure to discharge his burden of proof.

Claim at Serial No. 3

25. The learned Trial Court has allowed Respondent's entire claim in respect of **Serial No. 3** listed in the box in para 5 herein above based on the Appellant's failure to cross-examine the Respondent's witness on his categorical statement in the examination-in-chief that the installation of 14 air conditioners was done on the direction of the Admin department and in reliance of Bill No. 003 produced as part of Ex. P-6 (not Ex-P3/1-88 as incorrectly stated in the Impugned Judgment). The statement about directions from the Admin department was out of pleadings and as

such according to settled law could not be allowed into evidence. Even otherwise, a bare perusal of the said Bill shows that it only reflects dismantling and re-installation of 13 air conditioners. Apart from such discrepancy, Bill No. 3 reflects that it is an un-dated and self-generated document of the Respondent, which does not bear any acknowledgment of receipt by the Appellant nor was any other proof of receipt produced by the Respondent. The Appellant has denied in its Written Statement that any invoice was raised by the Respondent or work completion certificate issued by the Appellant in respect of this claim. There is nothing on the record to establish the period of time to which this bill pertains. In the absence of any work or purchase order raised by the Appellant soliciting such services as mentioned in Bill No. 003 and/or work completion certificate issued by the Appellant confirming provision of services (which the Appellant was admittedly in the practice of issuing), we cannot hold in favor of the Respondent simply because the Appellant failed to cross-examine the Respondent on self-generated bills produced by the same. Therefore, on the basis of preponderance of evidence, we hold against the Respondent in respect of **Serial No. 3**.

26. Before parting with this judgment, we would also like to deal with Ex. P2/1-82 most heavily relied upon by the learned counsel for the Respondent. Learned counsel for the Respondent claimed that this document was signed by a representative of the Respondent described as “responsible person” and also “checked” and “verified” by two persons from the Appellant company. Without adverting to such submissions, it may be seen that the said exhibit pertains to the period from December, 2013 till 2014. However, the Bills under consideration in this appeal in respect of the claim at Serial No. 1 pertain to the period from July, 2011 till April, 2014 whereas no period has been identified in respect of the claim at Serial No. 4. Even otherwise, no amounts can be ascertained from this exhibit

nor does it contain any other information which would connect it to the concerned bills or otherwise establish the Respondent's claims. Last but not least, the persons who allegedly signed the document on behalf of the Appellant were neither summoned nor were the Appellant's witnesses confronted with this document.

27. The learned Trial Court erred in relying upon marked documents contrary to settled law according to which marked documents have no evidentiary value and as such no finding or decision can be based upon such documents. The learned Trial Court also failed to appreciate that a presumption of admission cannot be drawn solely on account of failure to conduct cross-examination and that such omission has to be evaluated keeping in view the totality of circumstances including the pleadings of the parties and evidence produced.

28. The epitome of the above discussion is that, learned Trial Court has decided Issues No.1 and 2 in favour of the respondent/plaintiff without considering the law on the subject, as discussed above, on the basis of incorrect appreciation of evidence, therefore, we disagree to the findings of the Trial Court on Issues No. 1 and 2, hence, same are set-aside and reversed.

29. Accordingly, for the reasons afore stated, this appeal is **allowed** and the Impugned Judgment & Decree of the Trial Court is hereby set aside.

(MOHSIN AKHTAR KAYANI)
JUDGE

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in open Court on _____

JUDGE

JUDGE